CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1927

HENRY F. SHAFFNER v. MORRIS LIPINSKY, S. W. LIPINSKY, LOUIS LIPINSKY, CLARA LIPINSKY THORNER, AND HER HUSBAND, ROBERT THORNER, AND COMMERCE UNION TRUST COMPANY, MORRIS LIPINSKY, S. W. LIPINSKY, AND LOUIS LIPINSKY, THE LAST FOUR TRUSTEES OF AND UNDER THE LAST WILL AND TESTAMENT OF S. LIPINSKY, DECEASED.

(Filed 10 June, 1927.)

1. Taxation—Statutes—Calendar Year—Fiscal Year—Liens.

By express provisions of our statute, C. S., 3949 (3), the month, in its relation to the time taxes on real estate shall be due by the owner of lands, means the calendar month as distinguished from the lunar month, and applies to the fiscal year.

2. Taxation Statutes—Interpretation—In Pari Materia—Vendor and Purchaser—Deeds and Conveyances—By Whom Taxes Are Chargeable.

Chapter 101, Laws 1925, making the lien for taxes to attach 1 May, the Machinery Act, ch. 102, art. 3, sec. 44, requiring that the taxpayer shall return all real and personal property to the list-taker, owned by him 1 May, and sec. 59 (3), applying these provisions to cities and towns, and sec. 88, requiring the sheriff to account to the county treasurer, etc., are *Held* to be *in pari materia* with C. S., 3949 (3), and that in the sale of real property during the fiscal year the vendor is chargeable as against his vendee for the State, county, and city taxes accruing up to 1 May, following the date of his conveyance; and the vendor with those due for the remainder of the fiscal year ending 30 April.

APPEAL by plaintiff from *Shaw, J.*, at May Term, 1927, of BUNCOMBE. Affirmed.

This is a controversy without action. The agreed case is as follows:

"1. That the defendants, being the owners of the land and premises in the city of Asheville, Buncombe County, North Carolina, upon which is located the Drhumor Building, did, on ..... December, 1926, execute a written option to convey to the plaintiff said land and premises, for the consideration and upon the terms therein stated, which said contract or option, among other things, provided that 'The said parties of the first part agree and bind themselves, their heirs, executors and administrators, upon the exercise of this option within said time and the payment to them of the purchase price for said land and premises, as hereinbefore specified, to execute, acknowledge and deliver to the said party of the second part, or his assigns, a good and sufficient deed, with the usual covenants of seizin and warranty, conveying said land and premises, with all the appurtenances thereunto belonging, unto the said party of the second part, or his heirs or assigns, in fee simple, freed from all liens and encumbrances, except, and it is understood and agreed between the parties hereto, that the said land and premises shall be conveyed subject to the aforesaid mortgage or deed in trust to the New York Life Insurance Company, the rights of Annie L. Weaver to one-half of the west wall of the building on said land, and all existing leases held by tenants of the parties of the first part now occupying said premises; taxes on said land and premises shall be prorated between the parties hereto to the date of the exercise of this option.'

"2. That the plaintiff in due time exercised said option, and said land and premises were conveyed to the plaintiff by the defendants by deed dated 15 December, 1926.

"3. That at the time said contract or option was given, all taxes on said land and premises had theretofore been paid by the defendants, except the taxes which had been levied and assessed against said land and premises during the year 1926, by the city of Asheville and by the county of Buncombe, which taxes amounted to $5,481.25.

"4. That at the time said deed of conveyance was delivered to the plaintiff, the defendants contended and insisted that the tax year begins on 1 June of each year, and that, therefore, under the terms of said contract of sale or option, they, the defendants, were liable only for the taxes for 6½ months, covering the period from 1 June, 1926, to 15 December, 1926, and that the plaintiff was liable for the taxes for 5½ months, covering the period from 15 December, 1926, to 1 June, 1927.

"5. The plaintiff contended and insisted that the tax year begins either on 1 May or 1 January of each year, and not on 1 June, and that under the terms of said contract of sale or option he was liable for a propor-

tionate part of said taxes only for 4½ months, covering the period from 15 December, 1926, to 1 May, 1927; or for only a period of one-half month, from 15 December, 1926, to 1 January, 1927.

"6. In order that this difference of contention might not hinder or delay the closing of the transaction, and in order to prevent expensive litigation, it was agreed by and between the parties that the plaintiff should pay $2,512.18 of the taxes levied and assessed against said land and premises during the year 1926 by the city of Asheville and the county of Buncombe, said payment to be for the period of 5½ months beginning 15 December, 1926, and ending 1 June, 1927, as contended for and insisted upon by the defendants; and that thereafter all the parties would submit the matter on case agreed to the court for a decision as to when the tax year began for the taxes levied during 1926 by the city of Asheville and by the county of Buncombe; and that if it should be found that the said tax year began on 1 June, as contended by the defendants, plaintiff should not be entitled to recover anything from the defendants; and that if it should be found that said tax year began on 1 January, 1926, then the plaintiff would have been liable for taxes for only 15 days, from 15 December, 1926, to 1 January, 1927, and would be entitled to recover of the defendants $2,283.40; and if it should be found that the said tax year began on 1 May, 1926, then the plaintiff would have been liable for taxes for a period of 4½ months, from 15 December, 1926, to 1 May, 1927, and would be entitled to recover of the defendants $456.77.

"7. That the plaintiff, in accordance with said understanding and agreement, did pay $2,512.18 of said taxes levied against said land and premises during the year 1926 by the city of Asheville and by the county of Buncombe.

"8. That the plaintiff is entitled to recover of the defendants the sum of $2,283.40 if said tax year for said taxes began 1 January, 1926.

"9. That the plaintiff is entitled to recover of the defendants the sum of $456.77 if said tax year for said taxes began 1 May, 1926.

"10. That the plaintiff is not entitled to recover anything from the defendants if the tax year for said taxes began 1 June, 1926.

"11. That the court costs of this case agreed shall be shared equally by plaintiff and defendants."

The judgment rendered by the court below is as follows: "This cause coming on to be heard on an agreed case and affidavits submitted therewith, and the court being of the opinion and holding as a matter of law that the tax year for the property taxes levied by the county of Buncombe and the city of Asheville, during 1926, began on 1 May, 1926, and ended on 30 April, 1927. It is therefore ordered, adjudged, and decreed

that the plaintiff have and recover of the defendants $456.77, and that the cost be shared equally by plaintiff and defendants, as agreed."

Plaintiff excepted to the judgment, assigned error, and appealed to the Supreme Court.

Bourne, Parker & Jones for plaintiff.
Merrimon, Adams & Adams for defendants.

CLARKSON, J. C. S., 3949 (3), is as follows: "'Month' and 'year.' The word 'month' shall be construed to mean a calendar month, unless otherwise expressed; and the word 'year,' a calendar year, unless otherwise expressed; and the word 'year' alone shall be equivalent to the expression 'year of our Lord.'"

The case of *Rives v. Guthrie,* 46 N. C., p. 84, was an action of slander. The question involved in that case was whether a statute which makes use of the word "months" meant a lunar or calendar month. The statute under construction provided that the action must be brought in six months. The same as the present statute, C. S., 444. At p. 85: "'Month (in Saxon, Monath) is from Mona, the moon. In popular language, four weeks, or 28 days, are called a month, which consists of one revolution of the moon, or the period from one change or conjunction of the moon with the sun, to another'—Webster's Dictionary. The calendar or almanac month, consisting of 28, 29, 30, and 31 days, is an arbitrary or artificial division of time, made to correspond with the 12 signs of the Zodiac."

Nash, C. J., speaking to the subject in the *Rives case, supra,* at p. 86, said: "In deciding the question, our attention is naturally drawn to the history of the division of time into years, months, and weeks. The latter is of Divine institution, being the time employed by the Creator of all things, in the creation of the world, and marked by Him, by a command, to keep holy the seventh. The other two divisions are of man's invention. It was early discovered that they were necessary; observation pointed out that the apparent course of the sun around the earth occupied a period of a little more than three hundred and sixty-five days. The changes of the moon, which were observed to occur every twenty-eight days, naturally suggested the division of months. . . . The Julius Cæsar system continued until 1582, when Gregory XIII introduced what is called the new style, and is still in use under the name of the new, or Gregorian Calendar." The learned *Chief Justice,* after going into an interesting discussion as to man's fixing time, held that the 6 months meant lunar months of 28 days under the common law, and the action was barred. This decision has been changed by the statutory construction above set forth. *"Calendar year*—The calendar year is

composed of twelve months, varying in length according to the common or Gregorian Calendar. *In re Parker's Estate,* 14 Wkly., Notes Cas. (Pa.), 566." Black's Law Dic., p. 162. *"Calendar year.* Ordinarily and in common acceptation three hundred and sixty-five days, save leap year." 9 C. J., at p. 1118. *Muse v. Assurance Co.,* 108 N. C., p. 240. *"Fiscal year.* In the administration of a state or government, or of a corporation, the fiscal year is a period of twelve months (not necessarily concurrent with the calendar year), with reference to which its appropriations are made and expenditures authorized, and at the end of which its accounts are made up and the books balanced. See *Moose v. State,* 49 Ark., 499, 5 S. W., 885." Black, *supra,* p. 502.

Plaintiff contends that the tax year for *ad valorem* taxes is the calendar year of 1926, beginning 1 January, 1926, and ending 31 December, 1926. The court below construed the language of the statutes and sections to the effect that the tax year began on 1 May, 1926, and ended 30 April, 1927. In this we think the court correct.

C. S., 7987, says the "lien shall attach on the first day of June annually." See, also, C. S., 2815. *Carstarphen v. Plymouth,* 186 N. C., p. 90.

The Revenue Act of 1925, which we are now construing, says "which lien shall attach *on the first day of May annually."*

Chapter 101 is entitled "An act to raise revenue." Section 1 is as follows: "The taxes hereinafter designated are payable in the existing national currency, and except as otherwise provided, shall be for the calendar year in which they become due. The lien of the State, county, and municipal taxes levied for any and all purposes in each year shall attach to all real estate of the taxpayer situated within the county or other municipality by which the tax list is placed in the sheriff's or tax collector's hands, *which lien shall attach on the first day of May, annually,* and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid."

Chapter 102 is the "Machinery Act," and relates "to the assessment of property and other purposes." Article 3, section 44, is in part as follows: "Each township list-taker and assessor appointed under the authority of this act shall advertise in five or more public places within the township, not later than the twentieth day of April, notifying all taxpayers to return *to him all real and personal property which each taxpayer shall own on the first day of May,* and said return shall be made to the list-taker during the month of May under the pains and penalties imposed by law, and naming the times and places at which he will be present to receive tax lists."

The governing bodies of each city or town—section 59 (3)—in part is as follows: "who shall be known as tax assessor, and who *shall list*

and assess all the real and personal property in such city or town for the purposes of municipal taxation of said city or town, *and in like manner* as in this chapter provided for listing property by township or assistant assessors list the land in such city or town."

Section 78 in part is as follows: "The taxes (*ad valorem* and poll) shall be due the first Monday in October in each year."

Section 88 in part is as follows: "The sheriff or tax collector shall pay the county taxes to the county treasurer or other lawful officer. . . . On or before the first Monday of May in each year the sheriff shall account to the county treasurer or other lawful officer for all taxes due the county for the fiscal year."

Construing these statutes and sections *in pari materia*—with reference to each other—the just interpretation, the spirit and right, would clearly indicate that the intent of the Legislature was, (1) That the tax year, twelve months, 365 days, for taxes levied on property in the county of Buncombe and city of Asheville (and in the State), during 1926, began on 1 May, 1926, and ended on 30 April, 1927. (2) The lien shall attach on the first day of May, the time fixed for the taxpayer to list his property for the ensuing year. The fiscal year for taxes began 1 May, 1926, and ended 30 April, 1927, the time is 12 months (365 days), same as the time of a calendar year. (3) The tax, although a lien from 1 May, is not due until the first Monday in October.

The learned judge in the court below, having had long years of experience on the bench, so construed the acts and sections. We think there is no error, and the judgment of the court below is

Affirmed.

W. H. DRAKE v. CITY OF ASHEVILLE AND JOHN M. GEARY.

(Filed 10 June, 1927.)

1. Negligence—Contracts—Independent Contractor—Safe Place to Work—Municipal Corporations—Cities and Towns.

Where a city contracts for the erection of a market house, to be not exceeding a certain cost when completed and accepted, and to pay the contractor in a certain sum for his services, and does not reserve or have supervision of the workmen or the contractor in relation thereto, the latter to pay all the cost of erection: *Held*, the contractor, under the terms of the contract, is an independent one, and the city is not liable in damages to an employee of the contractor for a personal injury caused by the failure of the contractor to furnish a reasonably safe place to work under the rule of the prudent man.

2. Contracts—Independent Contractor—Questions of Law—Courts.

Whether one employed to erect a building is an independent contractor is a question of law to be determined from the written contract.

3. Negligence—Master and Servant—Safe Place to Work — Evidence—Questions for Jury.

Evidence that the plaintiff was injured in the course of his employment by the failure of his fellow-servant to exercise ordinary care in furnishing him sound plank with which he and another employee were required to build a scaffold to a building on which he was to do his work, is sufficient to take the case to the jury upon the question of the actionable negligence of the defendant to perform his nondelegable duty in this respect.

APPEAL by plaintiff from *Raper, Emergency Judge,* at February Term, 1927, of BUNCOMBE.

Action to recover damages for personal injury. Plaintiff alleged that the defendant Geary, as vice-principal of his codefendant, had authority over carpenters and other laborers engaged in putting up a building for the city; that plaintiff was one of the carpenters employed by the defendants, and in the prosecution of his work was required to case certain windows in the building; that a scaffold was necessary; that plaintiff and another constructed a scaffold out of material furnished by the defendants; that the material was defective; that the defendants negligently failed to furnish material which was suitable for a scaffold; that after the scaffold was built plaintiff went upon it in the discharge of his duties; that owing to defective and unfit material, the scaffold gave way, and that he was thrown to the concrete floor eight feet below and was seriously injured. Among several other defenses, the city alleged that Geary was an independent contractor, for whose negligence, if any, it was not responsible; and Geary, denying all allegations of negligence, contended that in no aspect of the testimony was there evidence of negligence on his part. At the conclusion of the evidence the court gave judgment as in case of nonsuit, and the plaintiff excepted and appealed.

The contract between the defendants was as follows:

"That the said party of the first part (Geary), for and in consideration of one dollar ($1.00) to him in hand paid, receipt of which is hereby acknowledged, does agree with the party of the second part (City) to erect, build, construct and supervise the erection, building and construction and purchasing of the necessary material and supplies, the hiring and the supervision of the necessary mechanics and laborers, to erect the new city market, fire and police stations, just south of the present city hall, between Market and Spruce streets, in the city of Asheville, and on the present property owned by said city.

"That the party of the first part guarantees that the cost of said building shall in no case exceed three hundred and ten thousand dollars

($310,000), and that said building will be completed within a period of eight (8) months from the date the work is commenced, due allowance to be made for strikes, weather conditions, etc., beyond the control of the party of the first part.

"That the said party of the first part is hereby allowed the privilege of changing and altering the present plans and specifications consistent with good workmanship and with the idea in view of erecting a satisfactory type of building for the purposes said building is to be used, at the very lowest cost consistent with good workmanship and a satisfactory building. Such cost made necessary by additions and betterments is not to be considered as part of the guaranteed cost of $310,000, but shall be approved by the party of the second part as additions to the contract; also the party of the first part does hereby agree to make such changes, additions, and betterments at cost and without additions to his original fee of $20,000.

"The party of the second part hereby agrees to pay all material bills as presented and O.K.'d by the party of the first part.

"The party of the first part hereby agrees to give a good and sufficient bond for the faithful performance of the contract hereby agreed upon between the party of the first part and the party of the second part.

"The party of the second part hereby agrees to pay the party of the first part a fixed fee in the sum of $20,000 for the faithful performance of his contract, said fee to be paid at such times as the party of the first part requests, but in no case at any time during the construction of the building to exceed eighty per cent (80%) of the total fee hereinbefore mentioned, and the final twenty per cent (20%) to be paid upon the completion of the building and upon acceptance of the building by the party of the second part.

"In witness whereof the party of the first part and the party of the second part have hereunto affixed their hands and seals, this 12 June, 1924."

Mark W. Brown and J. Scroop Styles for plaintiff.
R. R. Williams for the city of Asheville.
Merrimon, Adams & Adams for John M. Geary.

ADAMS, J. That the defendant Geary was an independent contractor is one of the defenses on which the city of Asheville relies, and if this defense is established, the merits of others which are claimed to be available will not be discussed. This Court has often applied the doctrine, subject, of course, to certain exceptions, that for the actionable negligence of an independent contractor, the person for whom the work is done cannot be made to respond in damages. *Craft v. Timber Co.*, 132 N. C., 152, 158; *Denny v. Burlington*, 155 N. C., 33; *Greer v. Con-*

struction Co., 190 N. C., 632, 635. It has endeavored, also, to maintain the equally familiar principle that the interpretation of a contract which is free from ambiguity involves a matter of law for the decision of the court and not a matter of fact for the determination of the jury. *Young v. Lumber Co.,* 147 N. C., 26; *Gay v. R. R.,* 148 N. C., 336. The question we are to consider, therefore, is whether under the terms of the written agreement Geary was an independent contractor.

The term "independent contractor" has been variously defined, but the definitions embrace all the elements which are essential to an independent contract. "Where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control is reserved either in respect to the manner of doing the work or the agents to be employed in it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master." *Craft v. Timber Co., supra.* "An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified." *Young v. Lumber Co., supra.* "One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant." *Beal v. Fibre Co.,* 154 N. C., 147. "One for whom work is done is not the master or employer of him who has contracted to do the work when by virtue of the terms of the contract, the latter is an independent contractor; nor does the relationship exist between a contractor and his subcontractor when the latter is an independent contractor. An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the results of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done, or what the laborers shall do as it progresses." *Greer v. Construction Co., supra.*

Interpreted in the light of these and other decisions of the same import, the contract, in our opinion, makes Geary an independent contractor. The contract was lawful as to its purpose and proper as to its terms; there is no evidence that the city was negligent in the selec-

tion of Geary; it reserved no general control over the work in respect either to the manner in which it was to be done or to the workmen who were to be employed; it was interested only in the result and not in the several steps of the work as it progressed. Geary contracted to put up the building, to purchase the material and supplies, and to hire the mechanics and laborers. He was authorized to change the plans and specifications—the cost of the additions to be approved by the city, because he agreed to charge for the additional work nothing more than the actual cost. For these reasons, Geary, in our opinion, was not a servant, but an independent contractor, for whose negligence, if any, the city is not liable. *Aderholt v. Cordon,* 189 N. C., 748; *Cole v. Durham,* 176 N. C., 289, 300; *Simmons v. Lumber Co.,* 174 N. C., 220; *Gadsden v. Craft,* 173 N. C., 418.

A municipal corporation exercises certain functions for special or private corporate purposes, and others by virtue of certain attributes of sovereignty. It is contended that in constructing the building the city was in the exercise of a governmental function, but the decision of this question requires evidence which will fully disclose the purposes for which the building was to be constructed and the uses for which it is intended. Whether it is to be used in part for the profit, advantage, or peculiar benefit of the city, or exclusively for purposes of a governmental nature is not clearly revealed.

As to the city, we think the judgment of nonsuit should be affirmed; but we cannot say that there is no evidence as to the negligence of the defendant Geary.

There is testimony tending to show that the plaintiff was injured by falling from a scaffold which he had helped to build; that he and Brank were working together as carpenters, and that the construction of the scaffold was a part of the work required of them; that the lumber which went into the scaffold was defective and unsuitable for the purpose; that Harrison was a laborer, whose duty it was to see that everyone who asked for material "got it when he wanted it"; that Lee Drake was foreman, and had supervision of the laborers and carpenters; that he told Harrison to get some material for the scaffold; that when it was brought in he told the plaintiff and Brank to build the scaffold out of the material furnished; and, finally, that defective lumber was the cause of the fall, which resulted in the plaintiff's injury. From this evidence the jury might have drawn the inference that the injury was due to defective workmanship, for which the plaintiff was responsible, or to a failure to inspect the lumber, for which Geary was responsible, or to the concurrent negligence of the plaintiff and Geary.

In *Fowler v. Conduit Co.,* 192 N. C., 14 (p. 18), it is said: "The principles of liability growing out of the use of scaffolds, platforms and walk-

ways, as declared by the decisions of this Court, are as follows: (1) The employer must exercise ordinary care in selecting materials reasonably suitable and safe for the construction of such instrumentalities; (2) ordinary care must be exercised in the construction and inspection thereof; (3) if the employer delegates the construction of such instrumentalities to one of his employees, he is responsible for the manner in which this duty is discharged, and the employee using such instrumentality has a right to assume that the employer has exercised due care both in the selection of proper materials and in the construction of the instrumentalities." See, also, *Burgess v. Power Co.*, 193 N. C., 223, and *Robinson v. Ivey, ibid.*, 805.

There is at least some evidence that Geary negligently failed to make the proper inspection, and in consequence, furnished lumber that was defective. Whether the evidence is convincing must be determined by the jury, not by the court.

As to the city, the judgment of nonsuit is affirmed; as to Geary, a new trial is awarded.

J. C. RICHERT, JR., ET AL., v. JAMES SUPPLY COMPANY.

(Filed 10 June, 1927.)

1. Evidence—Appeal and Error—Instructions—Harmless Error.

A wife sought to have her husband declared her trustee in taking title to certain lands, and restrain his judgment creditor from selling the lands under execution in which judgment by default of an answer was rendered against the husband, but the judgment creditor answered and raised issues upon the question: *Held*, not prejudicial error to the answering defendant for the judge to allow in evidence the default judgment rendered against the husband, and to instruct the jury that the default judgment was excluded as to the rights of the judgment creditor to have the execution to issue.

2. Same—Judgments—Default—Pleadings.

Held, under the facts of this case, that the default judgment entered by the clerk against the husband for the want of an answer could not bind the answering defendant or prejudice his rights.

3. Appeal and Error—Evidence—Clerical Errors—Parol Trusts—Deeds and Conveyances—Harmless Error.

Where the right of the judgment creditor to issue execution against the lands of the husband depends upon whether he owned the title or held it in trust for his wife, who had paid the purchase price, and the entire controversy depended thereon, an inadvertence in the issue submitted in reciting a deed of release instead of the deed in question, both containing the same description as to the lands, will not be considered as a fatal variance

between the pleadings and the proof, or calling for a judgment in defendant's favor when the jury has found that the lands were held in trust for the wife.

4. Appeal and Error — Deeds and Conveyances — Clerical Mistakes — Descriptions—Harmless Error.

In this case, *Held*, a clerical error made in the complaint as to the date of a certain deed, and also in the judgment by default rendered by the clerk against one defendant, is not reversible error as to the other.

5. Evidence—Pleadings—Variance—Deeds and Conveyances—Appeal and Error.

Where a parol trust is sought to be engrafted on the title to lands conveyed to the husband in favor of the wife, is not a fatal variance between the allegation and the proof that there was a clerical error in the complaint in giving the date of the deed attached, and permitting this deed to be introduced in evidence where the description of the lands is identical in both deeds.

6. Pleadings—Interpretation.

Pleadings under our code system are liberally construed, so that actions may be had upon their merits.

APPEAL by defendant from *Harding, J.*, at August Term, 1926, of MACON.

J. C. Richert, Sr., was made a defendant with the James Supply Company. He and Gertrude Richert were husband and wife. On 24 May, 1911, Elizabeth Walden executed a deed for a lot in the village of Highlands, naming J. C. Richert as grantee. The deed was registered 17 July, 1911. At the Spring Term, 1925, of the Superior Court of Macon County the James Supply Company recovered a judgment against J. C. Richert, the grantee, for $2,574.53, with interest from 10 April, 1924, and issued a warrant of attachment against the lot described in the deed. On 7 April, 1925, Gertrude Richert brought suit against her husband, J. C. Richert, and the James Supply Company, alleging that she had paid the purchase money for the lot, and praying that her husband be declared a trustee for herself, and that the James Supply Company be enjoined from making a sale under its judgment and warrant of attachment. Both defendants were duly served by publication. J. C. Richert filed no answer, and the clerk rendered judgment against him by default final. He did not appeal. The James Supply Company filed an answer, and the case was transferred to the civil-issue docket, and was tried at the August Term, 1926, upon the following issue: "At the time of the sale of the land in controversy by Mrs. Elizabeth Walden, and the execution of the deed of 24 May, 1911, to J. C. Richert, was it in contemplation of the parties that the sale was to Mrs. Gertrude Richert and not to J. C. Richert?" The jury answered the issue "Yes." Pending the action, Mrs. Richert died, and her heirs

at law and administrator were made parties plaintiff. Upon return of the verdict, it was adjudged that J. C. Richert took title to the lot in trust for his wife, Gertrude Richert, mother of the present plaintiffs, J. C. Richert, Jr., and Margaret Richert, etc., that they be declared the owners, and that the sale under the judgment and warrant of attachment in behalf of the James Supply Company be enjoined. The supply company excepted and appealed.

Horn & Patton and Bryson & Bryson for plaintiffs, appellees.
T. J. Johnston for the James Supply Company, appellant.

ADAMS, J. The summons was served by publication on the defendants J. C. Richert and the James Supply Company, and no objection is made as to the sufficiency of the service. A verified complaint was filed at the time the summons was issued; an answer was filed by the James Supply Company, but not by its codefendant. The clerk gave judgment by default final against J. C. Richert, and transferred the case to the civil docket for trial of the issues raised by the answer of the James Supply Company. Neither defendant excepted to the judgment against Richert, or appealed therefrom; but after the trial in the Superior Court had begun, in fact, after the jury had been empaneled, the James Supply Company made a motion to strike out the judgment rendered by the clerk against J. C. Richert, and it now insists that the judgment was void. Its argument is based upon an alleged want of jurisdiction. It contends that the action was instituted to reform a deed on the ground of mistake, and to engraft a parol trust upon a conveyance of the fee, and that a suit involving these equitable elements is not within the purview of any statute authorizing the clerk to render judgment by default final. Laws 1921, Extra Session, ch. 92. It contends, also, that the answer of the supply company raised issues upon which the rights of both defendants depended, and that by operation of law the jury must determine these issues as between the plaintiffs and the defendant Richert. The appellant's conclusion is that the clerk's judgment is void, or, if only irregular, that the judgment is for this reason open to its attack. Quite a number of cases are cited which in our view of the controversy need not be minutely examined. The question of irregularity may be dismissed for this reason: When the plaintiffs introduced the clerk's judgment against Richert, the judge sustained the appellant's objection on the ground that the evidence was immaterial to the issue and "excluded the entire judgment." This ruling, in effect, declared the judgment void as to the defendant who objected. True, the court stated in the presence of the jury that judgment had been rendered against Richert, and this, the appellant contends, operated to its prejudice; but the posi-

tion, we apprehend, is based on sentiment rather than law, and in any event was made harmless by the instruction that as to the appellant the evidence was excluded, because it was immaterial.

We do not regard *Tennant v. Bank*, 190 N. C., 364, as authority for the position that the issue must have been answered by the jury as against the defendant Richert. If through indifference or collusion Richert saw fit to file no answer, the appellant was in no wise bound by his action or by the judgment against him; and herein lies the distinction between this case and Tennant's. Nor can we concur with the appellant in saying that there was a fatal variance in the pleadings and the proof—such discrepancy between the complaint and the issue submitted as necessarily invalidates the judgment. The deed from Elizabeth Walden to J. C. Richert for the lot in question was executed 24 May, 1911; the plaintiffs introduced another deed signed by Elizabeth Walden on 7 October, 1919, purporting to be the release of a mortgage executed by J. C. Richert on 25 May, 1911, to secure the payment of $2,200. The complaint refers to a deed from Mrs. Walden to Richert dated 8 October, 1919, and the clerk's judgment recites the execution of this deed through mistake. The issue submitted to the jury has reference to the deed of 24 May, 1911. The appellant contends that the clerk's judgment leaves the latter in full force and effect and purports to set aside the deed releasing the mortgage. To this there seems to be more than one answer. If the position be admitted, how can it avail the appellant? Upon the issue joined between it and the plaintiffs the jury found that the parties intended that the title to the lot should go to Mrs. Richert by the deed bearing date 24 May, 1911, and it was thereupon adjudged that J. C. Richert held the deed as trustee for his wife. The verdict and judgment preclude a sale of the lot as the property of J. C. Richert, and with this estoppel operating against it the appellant has no legal interest in a controversy between the plaintiffs and the alleged trustee as to the verbal accuracy of the clerk's judgment. We think, however, that there is intrinsic evidence of a clerical error as to the date of the deed both in the complaint and in the judgment of the clerk. In reference to the identity of the land described in the complaint, in the two deeds, and in the warrant of attachment there can be no doubt; it is admitted that in each instrument the description is the same. We are therefore of opinion that the first and second assignments of error must be disallowed.

The third and fourth assignments embrace an exception to the issue submitted and another to the court's refusal to submit the issues tendered by the appellant. It is insisted that there was error in permitting the plaintiffs to introduce in evidence for the purpose of attack the deed dated 24 May, 1911, because, as we understand, the complaint sets

out the deed dated 7 October, 1919, and not the deed of earlier date. It is said that there is no allegation in the pleadings in reference to the former deed, and that proof without allegation is as fatal as allegation without proof.

The complaint, it is obvious, proceeds upon the theory that when Mrs. Walden conveyed the lot it was the intention of the parties to vest the legal title in Mrs. Richert. It is alleged that the latter paid the whole of the purchase money; that a deed had been made to her and had been held in escrow pending her payments; that it had been lost and the execution of another had become necessary. The allegations were evidently intended to apply to the original conveyance and not to the release of the mortgage. The object of the prevailing system of pleading is to have actions tried upon their merits, and to this end pleadings are to be construed liberally and every intendment is to be adopted in behalf of the pleader, however inartificial the allegations may be, or however defective or redundant. *Brewer v. Wynne,* 154 N. C., 467; *Hoke v. Glenn,* 167 N. C., 594; *S. v. Trust Co.,* 192 N. C., 246. Considering the complaint in its entirety we conclude that the mere recital of the release instead of the deed first conveying the legal title is not fatal to the judgment or such error as calls for a new trial on behalf of the defendant; and for this reason the third and fourth assignments are overruled. It follows that the motion to dismiss the action as in case of nonsuit was properly denied. The remaining assignments are formal. We find

No error.

A. W. CRAWLEY AND ANNIE E. CRAWLEY, HIS WIFE, v. MARY H. STEARNS.

(Filed 10 June, 1927.)

Mortgages — Deeds and Conveyances — Title — After-Acquired Title — Estoppel—Trusts.

Where a conveyance of lands designated on its face as a second mortgage conveys title to secure the payment of notes held by C., and in the premises, and in the *habendum* names the C. as the grantee, and following the *habendum* is a clause making it the duty of B., trustee, to sell the lands upon default in the payment of the notes, etc., on demand of the holder, etc., and upon foreclosure sale make the deed to the purchaser, etc., and B., the trustee, afterwards acquires title by deed from C., and the instruments are duly registered under the provisions of our statutes: *Held,* the sale under the trust deed is a deed of bargain and sale, and upon its registration, has the effect of a feoffment conveying the title to the grantee, and the trustee having afterwards acquired the title, is estopped to deny it.

CRAWLEY *v.* STEARNS.

APPEAL by defendant from *Devin, J.*, at May Term, 1927, of WAKE. Submission of controversy without action. C. S., 626.

N. G. Fonville for appellant.
Barwick & Leach for appellee.

ADAMS, J. On 26 September, 1918, Berry W. Brown and Alice E. Brown, his wife, executed a written instrument, evidently intended as a deed of trust but designated on its face as a second mortgage, purporting to convey title to a lot in the city of Raleigh described as lot No. 9 on Shaffer's map, to secure the payment at maturity of three bonds, each in the sum of $500, held by L. B. Capehart and afterwards assigned to the Mechanics and Farmers Bank. The parties named are the makers, L. B. Capehart and Allen J. Barwick, trustee. In the premises of the instrument and in the *habendum* Capehart is named as the grantee. Following the *habendum* is this clause: "If the said parties of the first part shall fail or neglect to pay interest on said bonds as the same may hereafter become due, or both principal and interest at the maturity of the bonds, or any part of either, then, on application of said L. B. Capehart, or any assignee, or any other person who may be entitled to the moneys due thereon, it shall be lawful for and the duty of the said Allen J. Barwick, trustee, to advertise," etc. On 7 July, 1924, Barwick, as trustee, sold the lot by public auction to R. W. Winston, Jr., and thereafter, in pursuance of an order confirming the sale and directing a conveyance, executed and delivered to the purchaser a deed conveying the property described in the instrument designated "a second mortgage." The purchaser at once entered into possession and subsequently by warranty deed conveyed the lot to T. W. Johnson, under whom through mesne deeds with covenants of warranty the plaintiffs claim title. The plaintiffs have contracted to sell the lot to the defendant, who refuses to accept their deed on the ground that the deed of trust vested in Capehart the legal title, which was not divested by the trustee's deed to the purchaser. On 27 April, 1927, L. B. Capehart and his wife executed and delivered to Allen J. Barwick, trustee, a deed conveying all their right, title and interest in and to the lot in question and reciting, not only satisfaction of the secured debt, but ratification of the trustee's sale.

It is elementary learning that as to his grantee the maker of a deed will not be heard to contradict it, or to deny its legal effect by any evidence of inferior solemnity, or to say that when the deed was made he had no title. As against his grantee he is estopped to assert any right or title in derogation of his deed. Bigelow on Estoppel (5 ed.), 332; *Hutton v. Cook,* 173 N. C., 496; *Walker v. Taylor,* 144 N. C., 176;

Cuthrell v. Hawkins, 98 N. C., 203. Capehart and his wife are therefore estopped to deny the operation and effect of their conveyance to the trustee, and the trustee is estopped by his deed to deny that title passed to the purchaser at the sale made under the deed of trust. But here the question is raised whether the trustee is estopped to assert such title as he may have acquired on 27 April, 1927, by virtue of the deed from Capehart. "If a grantor having no title, a defective title, or an estate less than that which he assumed to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purported to convey, or perfects his title, such after-acquired or perfected title will inure to the grantee or to his benefit, by way of estoppel." 21 C. J., 1074, sec. 39; *Baker v. Austin,* 174 N. C., 433. In the deed of the trustee there is no covenant of warranty. Is he, nevertheless, estopped as to the after-acquired title?

At common law a covenant of warranty was necessary to preclude the grantor from asserting an after-acquired title; but there is authority for the position that if a deed shows that the grantor intended to convey and the grantee expected to acquire the particular estate the deed may found an estoppel, although it contains no technical covenants. 21 C. J., 1080, sec. 46; *French v. Spencer,* 21 How., 228, 16 Law Ed., 97. A concise presentation of the subject appears in *Olds v. Cedar Works,* 173 N. C., 161. The estoppel there relied on grew out of a deed containing a covenant of warranty; and while the doctrine of estoppel by warranty and estoppel by rebutter is discussed the Court, in an opinion written by *Allen, J.,* remarked: "There is also authority for the position that a deed without warranty, which purports to convey the land, passes an after-acquired title to the grantee; but it is not necessary to decide that question, as there is a warranty in the deed before us. . . . It is also held that a deed which purports to convey the land transfers the estate as by a fine *(Wellborn v. Finley,* 52 N. C., 237); that under our registration acts all deeds are put on the same footing as a feoffment *(Bryan v. Eason,* 147 N. C., 292) and Mr. Rawle in his work on Covenants, sec. 243, in discussing the effect of an estoppel by deed without warranty, says: 'Now, it must be carefully observed that by the common law there were two classes of cases in which an estate thus actually passes by estoppel, and two only. The first was where the mode of assurance was a feoffment, a fine, or a common recovery. Such was their solemnity and high character that they always passed an actual estate, by right or by wrong, and, as against the feoffor or conusor and his heirs, not only divested them of what they then had, but of every estate which they might thereafter by possibility acquire, and this doctrine has been applied in modern times. The second was where the assurance was by lease, under which, it will be remembered, estates

could take effect in *futuro;* and the estoppel seems to have been put upon the ground of such having been the contract or agreement between the parties.' If this position is sound—and we would be inclined to so hold if the question was before us—if there was no warranty, the heirs of the grantor could not recover the land under title claimed by descent as against a stranger, for the reason that the after-acquired title would pass to the grantor in the deed by estoppel, and as the heirs would not be the owners of the after-acquired title, they could not recover on it."

The principle is stated with like clearness by *Brown, J.,* in *Weeks v. Wilkins,* 139 N. C., 215: "As between the parties to a deed of bargain and sale, the seizin is to be considered in law as passing because the bargainor is estopped from showing that he was not seized of the title which the deed purports to convey, and if he was actually seized of such estate it was transferred by the statute of uses. As *Henderson, J.,* tersely says, in *Taylor v. Shuford,* 11 N. C., 129: 'As between the parties the bargain and sale shall pass what it purports to pass; as to strangers what it actually does pass.' This principle is founded in justice and reason. The grantee is necessarily influenced in making the purchase by the quality and extent of the estate which purports to be conveyed by the deed, and hence the grantor in good faith and fair dealing should thereafter be precluded from gainsaying it. Where the conveyance purports, as in this case, to pass a title in fee to the entire body of land, the grantor is estopped thereafter to say it does not. The consensus of all the authorities is to the effect that where the deed bears upon its face evidence that the entire estate and title in the land was intended to be conveyed, and that the grantee expected to become vested with such estate as the deed purports to convey, then, although the deed may not contain technical covenants of title, still the legal operation and effect of the deed is binding on the grantors and those claiming under them, and they will be estopped from denying that the grantee became seized of the estate the deed purports to vest in him. *Van Rensselaer v. Kearney,* 52 U. S., 323, is a leading case in which *Mr. Justice Nelson* states the doctrine with great clearness and wealth of learning. *Irvine v. Irvine,* 76 U. S., 625. The true principle is that the estoppel works upon the estate which the deed purports to convey and binds an after-acquired title as between parties and privies."

The conveyance executed by the trustee to the purchaser at the sale made under the deed of trust is a deed of bargain and sale which has been duly registered. The seizin is deemed to have passed because the maker is estopped, and the registration puts the deed on the footing of a feoffment. In our opinion the judgment is free from error and should be affirmed.

Judgment affirmed.

HARRY M. ROBERTS v. R. E. BURTON AND WYTHE M. PEYTON COMPANY.

(Filed 10 June, 1927.)

1. Taxation—License Tax—Principal and Agent—Sales—Commissions—Statutes—Real Estate Agents.

A real estate agent may not recover his commission from the owner in making a sale when he has not paid his license tax as required by our statute, Public Laws 1925, ch. 101, but in the action it must be shown that the services rendered come within the meaning of the statute.

2. Appeal and Error—Instructions—Requests for Instructions—Issues—Agreement of Parties—Courts.

Exceptions to the refusal of the court to give special prayers for instruction will not be sustained when it appears on appeal that the parties had agreed that the court should answer the issues to which they were addressed as a matter of law after verdict had been rendered on the other issues, and this has been done.

3. Judgments—Verdict—New Trials—Contracts.

Where the plaintiff sues to recover from the defendant one-half of the profits derived from the sale of real estate as agents for the owner, under an agreement to that effect as to certain lands, a judgment upon the verdict in his favor which includes commissions on defendant's sale of lands of others not included in the contract sued on, is reversible error and entitled the defendant to a new trial.

APPEAL by defendant Burton from *Shaw, J.*, at March Term, 1927, of BUNCOMBE.

On 26 September, 1925, the plaintiff and the appellant entered into a written agreement to take options on lands adjoining those of the plaintiff and sell them and divide the profits. Burton took an option on a tract owned by the plaintiff's wife; and Roberts and Burton took an option on 270.12 acres, the property of W. H. Sumner, at $100 an acre. The plaintiff alleged that this option was taken in Burton's name and that the Sumner land was sold to William and Mark Griffin for $238.60, and at a profit of $138.60 an acre, making a total profit of $37,454.80; that the plaintiff was entitled to one-half this amount and Burton to the other half; that the defendants by a secret agreement induced the Griffins to pay them $7,500 in cash, and to make notes for the remainder in various sums payable at different dates. The plaintiff alleged that the defendants have failed to account with him; that a receiver of the money and notes has been appointed, and that the plaintiff is entitled to recover from the defendants $3,750, and one-half the notes executed by the Griffins.

Denying the material allegations of the plaintiff the defendants alleged that the plaintiff and his wife gave Burton an option on her

tract containing 173.54 acres at the price of $600 an acre; that the two tracts were sold together for $380 an acre; that the total price at which the land was sold by the defendants was $168,590.80, or $37,454.40 in excess of the purchase price; that the expense incurred in making the sale was $18,724.40, leaving $18,724.40 as the net profit. The verdict was as follows, the sixth and eighth issues having been answered by the court as matters of law, after the others had been answered by the jury:

1. Did the defendant Burton enter into a contract with his codefendant, Peyton & Company, to assist the said Burton in making sale of the Roberts and Sumner tract? Answer: Yes.

1½. If so, did said Peyton & Company perform said services? Answer: Yes.

2. If so, what amount, if any, were the defendants, Peyton & Company, entitled to under said contract? Answer: $18,727.40.

3. Did the plaintiff Roberts have any notice of the said contract entered into between the said Burton and Peyton & Company until after the transaction had been closed by sales contract between the plaintiff and wife and Griffins, and Sumners and Griffins? Answer: No.

4. Did the defendant, Wythe M. Peyton & Company have notice at the time it entered into the contract with R. E. Burton that the defendant, R. E. Burton, had any contract with the plaintiff Roberts in regard to the division of profits on the Sumner tract? Answer: Yes.

5. What were the services rendered by the defendant Peyton & Company under the arrangement with R. E. Burton reasonably worth? Answer: $9,315.50.

6. Was the plaintiff entitled to any part of the $7,500 cash payment received by the said Burton as profits on the sale of land to said Griffins, as alleged in the complaint; and if so, what part? Answer: Yes, one-fourth part of the $7,500 cash payment, to wit, $1,895, with interest from 9 January, 1926.

7. If so, did the plaintiff waive his right to be paid in cash his part of the $7,500 referred to in the foregoing issue, as alleged by defendant Burton? Answer: No.

8. Is the plaintiff entitled to any part of the $29,954.80 in notes received by the defendant, R. E. Burton, from William Ray Griffin and M. A. Griffin as profits on the sale of lands to said Griffins, as alleged in the complaint; and if so, what part? Answer: Yes, one-fourth part of each of said notes.

9. What was the value per acre of the Sumner tract at the time of the sale of said property to William Ray Griffin and M. A. Griffin? Answer: $100.

10. What was the value per acre of the Roberts tract at the time of the sale of said property to William Ray Griffin and Mark A. Griffin? Answer: $600.

Thereupon it was adjudged that the plaintiff recover of the defendant Burton $1,875 (one-fourth of $7,500), with interest from 9 January, 1926, and one-fourth of each of the notes aggregating $29,454.80 ($7,363.70), with interest from 9 January, 1927, and that the notes in the hands of the receiver be charged with the payment of these amounts; that the receiver sell the notes and apply the proceeds in payment, the notes received from Burton being primarily and those received from Peyton Company secondarily liable for the payment of the amount due the plaintiff—no sale to be made if the judgment was satisfied within ninety days. The defendant Burton excepted and appealed.

Vonno L. Gudger, Gallatin Roberts and Mark W. Brown for plaintiff.
Bourne, Parker & Jones for appellant Burton.

ADAMS, J. There was no error in refusing to dismiss the action as in case of nonsuit. It is true that every individual buying real estate for profit, whether as agent or otherwise, is required to pay a license tax, and that no recovery can be had on a contract forbidden by law either in express terms or by implication from the fact that the transaction has been made an indictable offense or has been subjected to the imposition of a penalty. Laws 1925, ch. 101, sec. 30; *Finance Co. v. Hendry,* 189 N. C., 549. But we do not think the evidence is sufficient to show that the plaintiff was engaged in buying or selling real estate within the meaning of the cited statute. *Respess v. Spinning Co.,* 191 N. C., 809. The first and third assignments are therefore overruled; the second is abandoned.

Assignments four and five are addressed to the court's refusal to give the jury certain prayers for instructions in reference to the amount of the plaintiff's recovery; but the parties, reserving their right to except, agreed, as appears of record, that the two issues relating to the amount of the recovery should be answered by the court after the other issues had been answered by the jury. The judge answered these two issues, and of course there was no reason or occasion for giving the instructions. There is no specific exception to his answers, but the sixth assignment of error is "the action of the court in signing the judgment as appears in the record." This may be treated as an exception to the judgment, including of course the answers given to the sixth and eighth issues. Under the agreement they were to be answered by the judge as matters of law. (R. 57.) The plaintiff alleged that the total profit was $37,454.80—$7,500 in cash and $29,954.80 in notes. Deducting from the total profit the sum given Peyton & Company in response to the second issue ($18,727.40), we have as a remainder an equal sum (a part

in money, a part in notes), one-half of which is awarded the plaintiff by virtue of the two issues which were answered by the court. If it be assumed that the calculation is correct, the amount apportioned or divided between the plaintiff and Burton represents the net profit of the sale of the Roberts and the Sumner tracts, but the agreement of the plaintiff and Burton made 26 September, 1925, was confined to options on lands adjoining the Roberts property. Their agreement to divide the profits did not include the profits derived from the sale of the land of Mrs. Roberts. The profit arising from the sale of the Sumner land should be determined by the jury under appropriate instructions by the court. For the reason indicated there must be a

New trial.

GRAHAM COUNTY v. W. K. TERRY & COMPANY AND FEREBEE & COMPANY.

(Filed 10 June, 1927.)

1. Taxation—Counties—Bonds—Constitutional Law—Statutes — Amendments.

Where the Legislature has passed an act authorizing a county to pledge its faith and credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with Art. II, sec. 14, of the State Constitution, and by later ratification of an act requiring the question to be submitted to the qualified voters: *Held*, it is not required that the later ratified act be also passed in accordance with the constitutional requirement, and in the absence of a proper election, the bond issue will be declared invalid.

2. Constitutional Law—Contracts—Vested Rights—Retroactive Statutes —Statutes—In Pari Materia.

Where a valid act authorizing a county to issue bonds has been passed in accordance with the provisions of the State Constitution, Art. II, sec. 14, leaving out the requirement that the question must first be submitted to the qualified voters, and another act ratified a few days later makes this requirement, the two acts will be construed *in pari materia*, and the later as not having a retroactive effect, and the county does not acquire a vested right under the first ratified act. Const., Art. I, sec. 17.

3. Statutes—Amendments—Taxation—Bonds—Counties.

Where the Legislature has passed an act, according to the provisions of our Constitution, Art. II, sec. 14, authorizing a county to issue bonds, unless it is made to appear to the contrary, an act ratified several days later presumes a legislative intention to regard the first act as continuing within its contemplation, subject to amendment.

4. Same—Constitutional Law—Taxation—Counties—Bonds—Elections—Ratification by Electorate.

Where the Legislature has passed an act authorizing a county to issue bonds according to the provisions of Const., Art. II, sec. 14, it is within its power to add a provision that the question be first submitted to the electorate of the county in order to the validity of the proposed bonds.

APPEAL by plaintiff from a judgment of *Stack, J.*, in a controversy without action. On 10 January, 1927, the board of commissioners of GRAHAM County adopted the following resolution:

"Whereas, the offer of Messrs. Ferebee & Company, of Andrews, N. C., and W. K. Terry & Company, for the purchase of $100,000 Graham County road and bridge bonds is the highest and best offer received, and it is hereby resolved that the said bonds be hereby awarded to Messrs. Ferebee & Company and W. K. Terry & Company, upon the terms of their bid now upon file with the register of deeds, and it is further agreed that this board will coöperate with the said Ferebee & Company with the view of having any necessary legislation enacted and the passage of any resolutions that may be necessary, with the view that said bonds be approved by their attorneys at the earliest possible date."

In the statement of facts it appears that the indebtedness of the county was equal to fifteen per cent of the taxable valuation of its property and "that said bonds would not be valid without an act of the Legislature." An act purporting to validate the bonds was passed in compliance with Constitution, Art. II, sec. 14, and ratified 4 March, 1927; and on 9 March, 1927, another act was ratified by the Legislature requiring the validating act to be submitted to the qualified voters of the county. The election has not been called. The board is ready to deliver the bonds and has demanded the purchase price, but the defendants have refused to accept the bonds on the ground that they would be invalid unless approved by a majority of the voters of the county. Judge Stack, being of opinion that the bonds are invalid and that the defendants are not required to take and pay for them, gave judgment accordingly, and the plaintiff excepted and appealed.

R. L. Phillips for appellant.
No counsel contra.

ADAMS, J. The appellant contends that the act submitting to the qualified voters of the county the question of issuing the bonds is ineffective because it was not passed in compliance with Art. II, sec. 14, of the Constitution. The section is as follows: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose

any tax upon the people of the State, or allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

The act of 4 March, purporting to validate the proceedings of the board of commissioners, was passed in accordance with the constitutional requirements and was not amended, changed, or modified as to its terms in any respect by the act which five days afterwards referred the question of issuing the bonds to the voters of the county. In *Glenn v. Wray,* 126 N. C., 730, cited by the appellant, the act authorizing a subscription for stock in a railroad company was amended on the third reading, and the question was whether the amendment was material. In the present case the object of the later act was to ascertain the will of the taxpayers—to give them an opportunity by means of a referendum to share in the legislative power which is reserved to the people (25 R. C. L., 804, sec. 53), and not to raise money on the credit of the county, or to pledge the faith of the county, or to impose a tax.

The plaintiff's second position is this: that upon ratification of the act of 4 March a binding contract existed between the plaintiff and the defendants which no subsequent legislation could impair; that the parties are protected by the constitutional provisions that no person ought to be deprived of his property but by the law of the land, and that no State shall pass any law impairing the obligation of contracts. Constitution of United States, Art. I, sec. 10; Constitution of North Carolina, Art. I, sec. 17.

The evil against which the Federal Constitution intended to guard was the effect incident to the operation of the forbidden law. *Barnes v. Barnes,* 53 N. C., 366. The resolution adopted by the board of commissioners contains this clause: "It is further agreed that this board will coöperate with the said Ferebee & Company (bidders for the bonds) with the view of having any necessary legislation enacted and the passage of any resolutions that may be necessary, with the view that said bonds be approved by their attorneys at the earliest possible date." It is evident, we think, that the resolution contemplated delivery of the bonds and completion of the contract only after the usual examination and approval of the law authorizing the issuance of the bonds. It affirmatively appears that the bonds have not been approved, presumably because the question whether they shall be issued has not been submitted to the voters of the county. The act requiring the bonds to be voted on was ratified on the fifth day after the ratification of the act purporting

to validate the resolution of the commissioners. The same Legislature, of course, enacted both statutes. Whether the later act was pending when the earlier was ratified the record does not disclose; but the two are so nearly related as to the date of ratification, the subject-matter being the same, that we cannot hold as a matter of law that the Act of 9 March has the effect of impairing the obligation of a contract in disregard of the constitutional inhibition. It seems to have been the purpose of the General Assembly not to treat as final the Act of 4 March, but to retain control of the subject for additional or supplemental legislation. That this was within the legislative power is not open to question. Cooley's Const. Lim., 152. We are not inadvertent to the principle that the law of contract enters into the contract itself *(Hill v. Brown,* 144 N. C., 117), or that vested rights may not be destroyed as a rule by the retroactive operation of a statute *(Lowe v. Harris,* 112 N. C., 472); but we think that neither of these principles is controlling in the case before us. The two statutes are *in pari materia* and must be construed together. Moreover, the question presented will be academic if an election is held and the bonds are approved.

Judgment affirmed.

ANNIE STILES HYATT v. W. L. McCOY.

(Filed 10 June, 1927.)

1. Actions—Husband and Wife—Parties—Constitutional Law—Seduction Statutes.

Under the provisions of our State Constitution, feigned issues are abolished, and actions should be brought by the real parties in interest, and under the provisions of C. S., 2513, an unmarried woman who has been seduced may, in proper instances, maintain her action for damages against her seducer.

2. Seduction—Married Women—Voluntary Submission — Support — Actions.

An action by a married woman for damages caused by seduction of her virtue by the defendant will not lie when it is made to appear that she yielded to him under his promises to provide for her and her husband, who was disabled from earning a support for them.

APPEAL by plaintiff from *Stack, J.,* at April Term, 1927, of MACON.

The plaintiff brought suit to recover damages for seduction; the defendant demurred to the complaint; the demurrer was sustained, and the plaintiff excepted and appealed.

A summary of the material allegations of the complaint follows: The plaintiff is a married woman; her husband was Perry Hyatt; they were

married 21 April, 1912; her husband, while working for the defendant suffered serious physical injury, and was afterwards unable to gain a livelihood; the defendant told her that he was a man of means and would support her and her husband; on various occasions he made similar promises. He spent much time in her company, rode with her in his car, and said he would give her a lot and build a house on it for her husband and herself. By means of flattery and false and fraudulent statements he persuaded her to submit to his embraces on several occasions, and on 27 August, 1926, she gave birth to a child. The circumstances of this bare outline are stated with particularity in the complaint, but a minute recital here is not necessary to an understanding of the legal questions that are involved.

The defendant demurred to the complaint on three grounds:

1. That it appears from the complaint that the plaintiff has no legal capacity to sue and maintain this action.

2. That the complaint does not state facts sufficient to constitute a cause of action.

3. That it appears from the complaint that the plaintiff is a married woman and is incapable of bringing and maintaining this action.

Horn & Patton and Bryson & Bryson for plaintiff.

Moody & Moody, McKinley Edwards and Henry G. Robertson for defendant.

ADAMS, J. The first and third grounds of demurrer were overruled, and the only question for decision is whether the complaint states facts sufficient to constitute a cause of action. It is provided by statute that damages for personal injuries or other tort sustained by a married woman may be recovered by her without the joinder of her husband; and her right to bring suit is not affected by any distinction between a negligent and a wilful wrong. C. S., 2513; *Roberts v. Roberts,* 185 N. C., 566; *Crowell v. Crowell,* 180 N. C., 516. But the specific point we are now to consider is this: Is a married woman who yields to the seductive embraces of a married man and thereby becomes a partaker of his crime authorized by the law to maintain an action against him for damages, under the allegations contained in the complaint?

To avoid confusion we must bear in mind that the controlling principle is not that upon which the husband may bring suit for the seduction of his wife or the alienation of her affections, or upon which the parent may sue for the wrong done his child, or the master for the wrong done his servant. At common law the action was based upon the relation of master and servant, not upon that of parent and child or husband and wife, and the measure of damages was such as the master would recover

for the injury to his servant. This relation, however, is regarded as a fiction. "All the authorities show that the relation of master and servant between parent and child is but a figment of the law, to open to him the door for the redress of his injury. It is the substratum on which the action is built. The actual damage which he has sustained in many, if not in most cases, exists only in the humanity of the law, which seeks to vindicate his outraged feelings."—*Nash, J.*, in *Briggs v. Evans,* 27 N. C., 16. See, also, *Kinney v. Laughenour,* 89 N. C., 365; *Scarlett v. Norwood,* 115 N. C., 284; *Willeford v. Bailey,* 132 N. C., 402; *Snider v. Newell, ibid.,* 614; *Tillotson v. Currin,* 176 N. C., 479.

This fictitious relation denied to a woman the right to maintain an action under the common law for her seduction. In some of the States the right has been conferred by statute; with us it has been recognized by judicial decision on the theory that feigned issues are abolished and that the woman is the real party in interest. Const., Art. IV, sec. 1; C. S., 446. In *Hood v. Sudderth,* 111 N. C., 215, 219, it is said: "The Code, sec. 177, having provided that an action should be brought by the real party in interest, it should be beyond controversy that where an action is for seduction of a woman of full age she, and not the father, is the proper one to bring the action." There the suit, brought by the woman was sustained, the complaint having been construed as broad enough to include an action for breach of promise to marry, for fraud and deceit, for injury to character and person, and for seduction. In *Strider v. Lewey,* 176 N. C., 448, the plaintiff, a minor, alleged that "the defendant, her grandfather, took advantage of her youth and inexperience, and with wicked and diabolical design upon her innocence and virtue induced her to submit to his wishes"; and *Hood v. Sudderth* was cited as a precedent for the action. The basis of the action in *Hardin v. Davis,* 183 N. C., 46, was not so much a breach of promise as "deception, enticement, or other artifice." The plaintiff in each of these cases was unmarried; each plaintiff was the victim of a false promise of marriage, or of dominating influence, or of fraud and deception upon which she reasonably relied. The Court has never held that the principle announced in these cases is applicable to an action instituted by a married woman to recover damages for her seduction. Indeed, the weight of authority denies such application of the principle. The general rule is that the plaintiff must bring forward evidence, not only that she was seduced, but that she was unmarried at the time of the seduction. 35 Cyc., 1311, 1319; 24 R. C. L., 770. A married woman by reason of the marital relation acquires a knowledge which ought to guard her from dangers of which an unmarried woman might have no knowledge. 24 R. C. L., 738; *Jennings v. Comrs.,* 21 L. A. R. (N. S.),

266n. Moreover, a woman cannot maintain an action for her own seduction if the surrender of her person is induced by the promise of compensation in money or its equivalent. In such event she is regarded as a voluntary accomplice, a partaker of the defendant's crime, and, in the words of *Parsons, C. J.*, "She cannot come into court and obtain satisfaction for an injury to which she was consenting." *Paul v. Frazier,* 3 Mass., 71; *Strider v. Lewey, supra.*

The representations leading up to the alleged injury are set forth in the complaint. The defendant promised to furnish money for the support of the plaintiff and her husband; he gave assurance that he was wealthy, and that they should be free from want; that he had bought two lots on Lake Emory and would give the plaintiff one of them and build a house on it for her; and, in short, that he would amply provide for the needs of the plaintiff and her husband.

These statements portray the character of the declarations by which the plaintiff was "led astray," as well as her motive in yielding consent. If the declarations were false the motive, considered in the light most favorable to the plaintiff, was the hope of pecuniary aid; but this reward of iniquity the law does not palliate or condone. We concur in his Honor's opinion that the action cannot be maintained. The judgment is

Affirmed.

STATE v. ODELL MEHAFFEY, LLOYD HARKINS AND NELL COFFEY.

(Filed 10 June, 1927.)

1. Instructions—Homicide—Appeal and Error—Prejudice—New Trials.

Where upon a trial for a homicide there is evidence tending to show that the prisoner acted in self-defense in taking the life of the deceased, an erroneous instruction to find the defendant guilty of murder in the second degree if the jury should find beyond a reasonable doubt that the killing was deliberately done, is not cured by other correct parts of the charge arising under the evidence of the case.

2. Same—Aiders and Abettors.

Where several defendants are tried for a homicide, an instruction not based on sufficient evidence that some of them would be guilty as aiders and abettors depending upon whether the one who committed the act did so under certain circumstances, is reversible error as to those charged with aiding and abetting.

CRIMINAL ACTION, before *Harwood, J.*, at November-December Term, 1926, of HAYWOOD.

The defendant MeHaffey, together with Lloyd Harkins and Nell Coffey, wife of the deceased, were tried upon a bill of indictment charging them with the murder of J. T. Coffey and with conspiracy to kill said Coffey.

The evidence tended to show that the deceased had been convicted of a violation of the prohibition law and confined to the common jail of Haywood County. The defendant, Nell Coffey, his wife, who was a double first cousin of the defendant Harkins, visited him while in jail from time to time. The deceased Coffey was released prior to the completion of his sentence and conceived the idea that there was intimate relation between his wife, Nell Coffey, and the defendant Harkins. On Sunday, 12 September, all the defendants were at Coffey's house, and Coffey had some conversation with Harkins about rumors in the neighborhood concerning his wife. The defendant Harkins suggested that he take the matter to court and have it determined. During the course of the conversation Coffey told the defendant Harkins not to take his wife in his car any more until the matter had been straightened out. Coffey was drinking and continued his drinking during the afternoon. After the defendants, MeHaffey and Harkins, had left the house of the deceased the deceased began to curse his wife, the defendant, Nell Coffey, saying, "He would take a gun and would not leave anything standing in five miles." The violence of the deceased put her in fear, and she left home and went out upon the highway, and in a short time the defendant, Lloyd Harkins, approached in an automobile in which were riding the defendant, MeHaffey, and his wife, and two small children. Mrs. Coffey appealed to them for protection, stating that her husband had threatened her and caused her to leave home, and that she was afraid to return home and spend the night, stating further that she would go to the home of her sister, Mrs. Ed Trull, and spend the night and return home after her husband became sober. After driving around for some time the party went to the home of Ed Trull and arrived there after dark. Just as they arrived at Trull's house the deceased came up to the car in a threatening and violent manner, ordering his wife to get out of the car, threatening "to shoot every damn thing in the car." He repeated this statement three or four times as he was approaching the car. The defendant, Harkins, contended that as the deceased approached him in the dark, using this threatening language, that he was put in fear of death or great bodily harm, and as the deceased reached the car he fired one shot, which killed the deceased.

Bowers, a witness for the State, testified that MeHaffey got out of the car and went around the car and shot the deceased. It appeared that only one shot was fired, and the defendant Harkins admitted the shooting. The deceased, Coffey, and the MeHaffey family had been very

friendly and had visited each other from time to time, and there was no evidence of any ill-will existing between them and the deceased.

The jury convicted the defendant Harkins of murder in the second degree and the defendant MeHaffey of manslaughter, and acquitted the defendant Nell Coffey.

From the judgment of the court, sentencing the defendant Harkins to a term of fourteen years in the State prison and the defendant MeHaffey for a term of eight years, both of said defendants appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Rollins & Smathers, Morgan & Ward and M. G. Stamey for defendants.

BROGDEN, J. The trial judge charged the jury as follows: "Gentlemen, if you shall find from the evidence, beyond a reasonable doubt, that Odell MeHaffey, with malice aforethought, intentionally fired a pistol at the deceased, J. T. Coffey, and killed him, and you fail to find beyond a reasonable doubt that the killing was done with premeditation and deliberation, then it would be your duty to return a verdict of guilty of murder in the second degree against Odell MeHaffey." "If you shall find from the evidence beyond a reasonable doubt that Lloyd Harkins, with malice aforethought, intentionally fired a pistol at the deceased, J. T. Coffey, and killed him; and if you shall fail to find beyond a reasonable doubt that at the time of the killing it was done with premeditation and deliberation, then it would be your duty to return a verdict of guilty of murder in the second degree against the defendant, Lloyd Harkins."

The learned trial judge correctly stated the law as to the right of self-defense in other portions of the charge, but the peremptory instructions above given, to all practical purposes, deprived the defendants of the force of such defense, and must be held as error.

The court further charged the jury: "If you shall find from the evidence beyond a reasonable doubt that the defendant, Lloyd Harkins, without malice and without premeditation and deliberation, fired the pistol at J. T. Coffey and killed him, then it would be your duty to return a verdict of guilty of manslaughter against him unless you shall find from the evidence the existence of such facts and circumstances as would excuse it on the ground of self-defense, and if you should find that the other two defendants were present at the time the fatal shot was fired and the defendant Harkins was not excusable at the time he fired the shot, that he was guilty of manslaughter, and the other two defendants or either of them were present for the purpose of aiding and abetting and assisting they, too, would be guilty of manslaughter, or if

you should find that one of them was present with that intention, then that one would be guilty."

"If you should find from the evidence, beyond a reasonable doubt, that the defendant Odell MeHaffey, without malice and without premeditation and deliberation, fired the fatal shot with a pistol and killed J. T. Coffey, then it would be your duty to return a verdict of guilty of manslaughter against Odell MeHaffey, unless he has shown by the evidence the existence of such circumstances as will excuse it on the ground of self-defense, and if you should find Odell MeHaffey guilty of manslaughter, and if you find from the evidence, beyond a reasonable doubt, that the other two defendants, or either of them, were present for the purpose of aiding, assisting and abetting and encouraging MeHaffey in the perpetration of the crime, then it would be your duty to return a verdict of guilty of manslaughter against the two, or against the one, as you shall find from the evidence."

Abstractly, these instructions are correct, but upon close scrutiny and examination of the record, we fail to find any evidence of aiding and abetting as defined by law, and the exceptions of the defendants to the instructions must be upheld. *S. v. Jarrell,* 141 N. C., 722; *S. v. Hart,* 186 N. C., 582; *S. v. Baldwin,* 193 N. C., 567.

There are other exceptions in the record, but by reason of the fact that a new trial is awarded, we refrain from comment in order that both the State and the defendants may have a fair and impartial trial upon the merits of the case.

New trial.

MARY EVANS v. SHEA BROTHERS CONSTRUCTION COMPANY.

(Filed 10 June, 1927.)

Roads and Highways—Negligence—Rule of the Prudent Man — Danger-Signals—Warnings—Barriers — Instructions — Appeal and Error — New Trials.

A contractor for the construction of a State highway is required to use the care of the ordinary prudent man to properly use such means as will protect those traveling thereon from being injured by places left in the incompleted work dangerous or menacing to those who may travel or attempt to travel along its route, and for its negligent failure therein is liable only for the proximate cause thereof; and an instruction that makes the defendant contractor liable absolutely to maintain an obstruction placed by it to prevent the use by the public of a place of danger, is reversible error upon which a new trial will be ordered on appeal.

APPEAL by defendants from *Stack, J.,* and a jury, at March Term, 1927, of GRAHAM. New trial.

This is an action for actionable negligence, brought by plaintiff against defendants for injuries sustained. Plaintiff, on 10 July, 1926, was in a Ford car with her husband, going to Yellow Creek; her son Cecil Evans was driving the car. The defendants, contractors under the North Carolina State Highway Commission Project No. 930, were constructing a part of State Highway No. 108, between Brooks Gap and Yellow Creek, in Graham County, crossing Service Branch between these two points.

John Shea, one of the defendants, testified in part: "This particular fill across the Service Branch, there were two roads there, and the roads were in a curve, and in order to straighten the road up I had to make a high fill across Service Branch, and started the narrow fill with wheelers across the Service Branch, and this road around was kept open at all times. Connor Brothers went around there. We went around, different people went around all the time. It was kept open and worked by the overseer. . . . When we stopped working, I put a 50-inch pipe across this fill and somebody rolled it away. I had not worked on it in three weeks. It wasn't long before the accident, because I was up there a few days before that myself. . . . It was impossible to build it all across there at one time; have to build it a row at a time. It was dangerous to go across there. I did not put signs there because there was a public road that you could go. The fill was not completed."

Cecil Evans testified in part: "We started down to Yellow Creek, and on the right-hand side going down was a big dump and curve, and after you got out of this curve from the left-hand side of the road you hit the first part of this dump, and when you hit it, it is rough and slopes up a little bit and hit the north side next to Yellow Creek; it is a steep bank and I couldn't pull it with the speed I had, and I started back to get more speed, and the loose dirt caught me and I turned over the bank. I was right on the fill before I could see it; I could see the ridge but could not tell what it was. I don't know whether it was a road before that or not." "Q. Could you tell whether there had been tracks on that part of the roadway where your car turned over? A. The witness answered 'Yes.' The fill must have been somewhere from 40 to 50 feet long, 8 to 10 feet high. The top of the fill was 6 or 6½ feet wide. The fill was rough, and when you got close to the top was a big bank of dirt that looked like it had been dumped out and tracks going over it. I started back to get a better start and the loose dirt caught my wheel and turned me over the bank. I did not see any detour sign or barrier before I got to that point of the road. That was my first trip over the road. I did not know whether it was a public road or not."

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$750.'"

After deliberating for some hours, the jury returned to the box and requested further instructions, and asked the following question: "One thing we want to know is, is the defendant responsible if he didn't keep this barrier in the place where it looked like the road turned? Would he be responsible if he didn't keep it there all the time? He said he put it there, not on the old road, but where the new construction was." By the court: "Yes, it would be the duty of the defendant to keep an obstruction there all the time, so long as the public was using it, and if he failed to have a warning up there, he would be negligent."

To this instruction, defendants excepted, assigned error, and appealed to the Supreme Court.

T. A. Morphew and T. M. Jenkins for plaintiff.
R. L. Phillips for defendants.

CLARKSON, J. In *Hughes v. Lassiter,* 193 N. C., p. 650, this Court has recently discussed matters presented in this action, and it is unnecessary to repeat.

It was contended in the present action by defendants that the road on which the alleged injury occurred was not a detour road. The plaintiff left the main highway and traveled a dangerous road not opened. The charge goes too far, and is prejudicial. The jury should have been instructed that, under all the facts and circumstances of the case, it was their province to determine whether defendant failed to exercise ordinary care—that degree of care which a prudent man should use and exercise under like circumstances and charged with like duty.

"In order to establish a case of actionable negligence in a suit like the present, the plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Ramsbottom v. R. R.,* 138 N. C., 41." *Whitt v. Rand,* 187 N. C., at p. 808.

In *White v. Realty Co.,* 182 N. C., at p. 538, it is held: "His Honor correctly charged the jury that if the negligence of McQuay, the owner and driver of the Ford car, was the sole and only proximate cause of

plaintiff's injury, the defendant would not be liable; for, in that event, the defendant's negligence would not have been one of the proximate causes of the plaintiff's injury. *Bagwell v. R. R.*, 167 N. C., 615. But if the degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to recover, because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another, or others. 'When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.' *Wood v. Public Corp., supra* (174 N. C., 697), and cases there cited." *Albritton v. Hill*, 190 N. C., 429; *Hanes v. Utilities Co.*, 191 N. C., 13.

For the reasons given, there must be a

New trial.

STATE v. THOMAS W. MANEY, ABRA MANEY, AND GUY ANDERS.

(Filed 10 June, 1927.)

Criminal Law—Assault—Husband and Wife — Self-Defense — Excessive Force—Questions for Jury.

Where a wife is assaulted in the presence of her husband by one using insulting language relating to her innocence and virtue, and the assailant had put his arm about her, the husband has the same right as the wife in using sufficient force to repel the attack, and the question of whether the force he used in striking the assailant in the face was excessive for that purpose, or prompted by a spirit of revenge, etc., is one for the jury.

APPEAL by defendant Thomas W. Maney from *Stack, J.*, and a jury, at August Term, 1926, of BUNCOMBE. New trial.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. E. Swain, R. Sidney King, and A. Hall Johnston for defendant.

CLARKSON, J. The defendant Thomas W. Maney, Abra Maney, and Guy Anders were indicted for assault with intent to kill Gus Harwood. Abra Maney and Guy Anders were acquitted by the jury, and Thomas W. Maney was convicted of simple assault. Thomas W. Maney was sentenced to serve 30 days in jail and pay all cost.

Thomas W. Maney testified in part: "I struck him in defense of my wife the first time, in defense of myself when he tried to cut me with a razor. When I hit him with my fist the first time, he had a hold of my

wife, and I struck him to make him turn her loose. . . . I struck Gus Harwood because he was assaulting my wife, and using that vile language to her. I would do the same thing, Mr. ....., if he assaulted your wife in my presence."

Mrs. Thomas W. Maney testified in part: "Gus Harwood was in a drunken condition, and when he saw me he come up to me in a very insulting manner and took hold of me, and said some very insulting remarks to me as to what he intended to do to me (language is too vulgar to use). But it reflected upon my purity and virtue. When he did this, my husband, Tom Maney, struck Harwood with his fist and made him release me, and then Harwood turned on my husband and made an assault on him in such a violent manner, and used such vile and insulting language in my presence, and in the presence of my children, that I was forced to run into the house and gather up my little children and leave home, going into the woods, and when I left, Gus Harwood and his friends were assaulting my husband."

The testimony of Thomas W. Maney was substantially that of his wife, and they were corroborated by Abra Maney and Guy Anders. A number of reputable citizens testified that the general reputation of defendant was good.

The court below charged the jury as follows, to which exception and assignment of error was duly made: "As to Tom Maney, if you find that he struck Gus Harwood, if you find beyond a reasonable doubt that the defendant Tom Maney struck Gus Harwood, at first because he put his arms around his wife and for using certain language before his wife and children, then he would not have been justified in hitting Gus Harwood in the face and knocking him down." We think the charge of the court below is not borne out by the law, and cannot be sustained under the facts and circumstances of this case.

Cooley's Blackstone, Vol. 2 (3 ed.), p. 2, lays down the law as follows: "The defense of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these of his relations be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection), makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths

of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay, even for homicide itself; but care must be taken that the resistance does not exceed the bounds of mere defense, and prevention; for then the defender would himself become an aggressor." Brill, Vol. 2, Cyc. Criminal Law, secs. 722, 723.

In 1 Bishop on Criminal Law (9 ed.), p. 623, it is said: "Ordinarily, if not always, one may do in another's defense whatever the other might in the circumstances do for himself. The common case is where a father, son, brother, husband, servant, or the like, protects by the stronger arm the feebler. The right to do this is unquestioned."

In *S. v. Johnson,* 75 N. C., at p. 175, it is said: "The proposition is true that the wife has the right to fight in the necessary defense of her husband, the child in the defense of his parent, the servant in defense of his master, and reciprocally; but the act of the assailant must have the same construction in such cases as the act of the assisted party should have had if it had been done by himself; for they are in a mutual relation one to another. Although the law respects the human passions, yet it does not allow this interference as an indulgence or revenge, but merely to prevent injury. The son, therefore, is allowed to fight only in the necessary *defense* of the father; and to excuse himself, he must plead and show that Shipwash could have beat his father, had the son not interfered. 3 Bl., 3, and note; 1 Hale Pl. Cr., 484; Bac. Ab. Master and Servant, P." *S. v. Brittain,* 89 N. C., 481; *S. v. Bullock,* 91 N. C., p. 614; *S. v. Cox,* 153 N. C., 638; *S. v. Greer,* 162 N. C., 640; *S. v. Gaddy,* 166 N. C., 341; *Roberson v. Stokes,* 181 N. C., at p. 63; *S. v. Holland,* 193 N. C., p. 713.

The testimony of Mrs. Maney was to the effect that Gus Harwood, in a drunken condition, came up to her and in a very insulting manner took hold of her and made insulting remarks, too vulgar to use, reflecting on her purity and virtue. Her husband, the defendant, struck him with his fist to make Harwood turn her loose. She had a right to strike Harwood to make him turn her loose, and her husband had the same right to strike him. The defendant did what he had a right to do. Such action was prompted by the primary law of nature—a husband's right to protect and defend his wife. If true, he acted under the highest impulse and instinct to protect the person of his wife from one who had assaulted her, and should not be held to an accountability by the law.

The court below charged the jury that if they found beyond a reasonable doubt that defendant Maney struck Harwood, at first because he

put his arms around his wife and for using certain language before his wife and children, that he would not be justified in hitting Harwood in the face and knocking him down. We cannot sustain the charge. It was a question for the jury to say, under the facts and circumstances of the case, whether defendant hit Harwood in the face and knocked him down to make Harwood turn his wife loose. He had a right to defend his wife against the assault of Harwood. The question of excessive force was for the jury.

In the oft-quoted case of *S. v. Perry,* 50 N. C., at p. 10, the rule of abusive language is thus stated: "If one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow. He is undoubtedly the immediate cause of the breach of the peace, and is morally the more guilty of the two."

In such a case, both are guilty of an affray—the one who strikes the blow and the one who uses the abusive language that prompted the blow. The vice in the charge is that the court below coupled two propositions in one and said that defendant was not justified if he struck Harwood in the face and knocked him down (1) because he put his arms around his wife, (2) and for using certain language before his wife and children. As to the first proposition, it was for the jury to say whether he was justified in striking him in the face and knocking him down to make him turn loose his wife, and in so doing, whether he used excessive force. As to the second proposition, it was for the jury to say whether defendant struck Harwood for the abusive language used before his wife and children.

Under the facts and circumstances of this case, "The measure of force which the defendant was permitted to use under such circumstances ought not to be weighed in 'golden scales.'" *S. v. Hough,* 138 N. C., at p. 668. The probative force of the evidence is for the jury.

For the reasons given, there must be a

New trial.

STATE EX REL. BOARD OF MEDICAL EXAMINERS AND COMMISSIONER OF PUBLIC WELFARE, PETITIONER, v. ROBERT S. CARROLL, RESPONDENT.

(Filed 10 June, 1927.)

Physicians and Surgeons—State Board of Medical Examiners—Revocation of License—Procedure—Appeal and Error—Questions for Jury.

The appeal from the State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the

practice of his profession, follows the procedure allowed in analogous cases, and the intent of the Legislature is interpreted to give a trial *de novo* in the Superior Court wherein the jury are to decide upon the evidence adduced before them the facts involved in the issue. C. S., 6618.

APPEAL by Board of Medical Examiners and Commissioner of Public Welfare from *Shaw, J.*, at April Term, 1927, of BUNCOMBE.

Proceeding for the revocation of a physician's license to practice medicine in the State of North Carolina. The charge preferred against the respondent by Mrs. Kate Burr Johnson, State Commissioner of Public Welfare, before the State Board of Medical Examiners was sustained, and the license revoked. On appeal to the Superior Court of Buncombe County, it was held that the respondent was entitled to a trial *de novo*, and to have the issue of fact determined by a jury. From this ruling, the Board of Medical Examiners and the Commissioner of Public Welfare appeal, assigning error.

Attorney-General Brummitt, Assistant Attorney-General Nash, and Luther Hamilton for appellants.

Julius C. Martin, Robert R. Williams, and Mark W. Brown for appellee.

STACY, C. J. It is the contention of the State Board of Medical Examiners and the Commissioner of Public Welfare that this is neither a criminal prosecution nor a civil action in the common-law sense, but a special proceeding under C. S., 6618, to revoke a physician's license to practice medicine, and that, on appeal to the Superior Court, as allowed by the statute, the respondent is not entitled to a trial by jury. The appeal, therefore, presents for our decision solely a question of procedure, nothing more.

The alleged prematurity of the appeal is pretermitted, as the point raised has not heretofore been decided by us, and it would seem that an expression of opinion would be helpful at this time, a course pursued in a number of cases and permissible under our decisions. *Corp. Com. v. Mfg. Co.*, 185 N. C., 17.

The initial step in the proceeding to revoke the license of respondent to practice medicine in this State was a petition filed by the Commissioner of Public Welfare with the State Board of Medical Examiners on 19 April, 1926, charging that "Doctor Robert S. Carroll has been guilty of 'grossly immoral conduct' with patients and nurses in the Highland Hospital in the city of Asheville, of which he is the owner and medical director," and asking that his license be revoked in accordance with the provisions of section 6618, volume three, of the Consolidated Statutes. Thereafter, on 26 June, 1926, following a full hearing of the case, had

after due notice given the respondent, the State Board of Medical Examiners entered an order revoking Dr. Carroll's license to practice medicine in North Carolina. From this order the respondent appealed to the Superior Court of Buncombe County, under the following provision appearing in the above-mentioned statute: *"Provided further,* that the holder of a license so revoked shall have the right to appeal to the courts; and if action of the board of examiners be reversed, he shall be allowed to retain his license."

At the threshold of the hearing in the Superior Court, the question arose as to how the matter should be tried, whether before the judge alone, upon the evidence taken before the board of medical examiners, or *de novo* before the judge and a jury. The court ruled that the respondent was entitled to a trial *de novo,* and to have the issue of fact determined by a jury. This ruling is challenged by the appeal. Nothing more is presented for our consideration or decision.

Many cases from other jurisdictions are cited in support of the position taken by appellants, and the respondent has likewise called to our attention a number of authorities which seem to support his position. The apparent conflict in the cases, however, becomes less real when it is remembered that the provisions of the several statutes, under which the actions or proceedings arose, are not all alike.

The authorities are unanimous in holding that the question of procedure, such as here presented, is one of statutory construction. If this be the correct view of the matter, and we think it is, then, to all intents and purposes, it would seem that the question has practically been decided in favor of the Court's ruling in *Blair v. Coakley,* 136 N. C., 405, where it was said: "In the absence of any procedure prescribed by statute, we must proceed by analogy to the practice in other like cases, so that the intent and purpose of the Legislature may be effectuated as near as may be, and that the right of appeal may be preserved to the citizen, and at the same time not abused." To like effect is the holding in *Cook v. Vickers,* 141 N. C., 101, where it was said: "Where an appeal is expressly or impliedly given, the courts may look to other general statutes regulating appeals in analogous cases and give them such application as the particular case and the language of the statutes may warrant, keeping in view always the intent of the Legislature."

We conclude that "the right to appeal to the courts," given by C. S., 6618, when exercised, carries the whole proceeding to the Superior Court for trial *de novo,* with the right to have the controverted issues of fact tried before a jury in the usual and customary way. *Keaton v. Godfrey,* 152 N. C., 16; *Corp. Com. v. Mfg. Co.,* 185 N. C., p. 22.

The trial court correctly ruled that the respondent was entitled to have the issue of his guilt or innocence submitted to a jury, agreeable to the

usual course and practice in the Superior Court; and had a jury been empaneled, and a verdict directed in his favor in the absence of evidence to support the charge preferred against him, with a judgment reversing the action of the board of examiners entered thereon, a very serious question would have arisen as to whether the whole matter was not now *res adjudicata*. But as a different course was pursued in the court below—a judgment of reversal being entered on a dismissal of the charge without the aid of a jury—we are constrained to remand the cause for further proceedings, not inconsistent with the conclusions announced herein.

Remanded.

MISSIE PICKLESIMER v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(Filed 10 June, 1927.)

Damages—Mental Anguish—Evidence — Questions for Jury — Courts—Matters of Law.

Where the plaintiff sues to recover damages for mental anguish she has sustained by not reaching the bedside of her dying mother, etc., alleged to have been caused by the mixed train upon which she was a passenger running greatly behind its schedule time, and there is no evidence that she had received any but courteous treatment from the defendant's conductor, to whom she stated the circumstances, or any other of the defendant's agents or employees: *Held*, error to submit to the jury the question of plaintiff's recovery of punitive damages as none are recoverable as a matter of law upon the evidence in the case. *Tripp v. Tobacco Co.*, 193 N. C., 614, cited and applied.

APPEAL by defendant from *Stack, J.*, at January Term, 1927, of CHEROKEE.

Civil action to recover damages alleged to have been suffered by plaintiff on account of the defendant's negligent failure to transport plaintiff as a passenger on the defendant's mixed train from Etowah, Tenn., to Murphy, N. C.

From a verdict and judgment awarding the plaintiff the sum of $1,000 as compensatory and punitive damages, the defendant appeals, assigning errors.

J. H. McCall and F. O. Christopher for plaintiff.
M. W. Bell for defendant.

STACY, C. J. On 26 March, 1926, the plaintiff, desiring to reach the bedside of her mother, who was very ill, purchased a ticket at Etowah,

Tenn., and took passage on a mixed train over the defendant's railroad to Murphy, N. C. This train was scheduled to arrive in Murphy at 1:50 p.m., but did not reach its destination on the day in question until 4:40 p.m., 2 hours and 50 minutes behind schedule time. The delay was caused by the train stopping along the way, unloading cinders, crossties, etc., and doing other work about the track. When the train arrived at Ranger, a station about eight miles from Murphy, being then an hour and thirty minutes late, the plaintiff informed the conductor of her desire to reach Murphy, giving her reasons therefor, and asked that he speed up his train. At a point about two miles out from Murphy, while the train was stopped, plaintiff was informed by a friend, one Emory Fleming, that her mother was dead, and that the funeral was then being held at Notla Church. Fleming offered to get his car and take plaintiff from there to the cemetery, which he did, arriving about 5:00 p.m., just as the people were coming away from the burial. Plaintiff brings this action in tort, alleging mental anguish and nervous shock, and seeks to recover both compensatory and punitive damages.

The plaintiff testified in part as follows: "The first time I spoke to the conductor was at Ranger. He was polite and courteous to me—just as nice as he could be—as nice as any gentleman could be. I didn't suffer any physical harm by reason of what the conductor did or anything he said; it was just the delay, just being so anxious to get to my mother. I didn't have anything like a blow or an insult from the conductor or train crew. The only complaint I am making is for the train being late and the distress of mind I suffered by reason of the train being late, that is true. I make no claim to have ever had a physical hurt like a blow or anything—just a nervous shock—and I spoke to the conductor only one time, and that was at Ranger."

In view of this evidence, we think the trial court erred in refusing to instruct the jury, as prayed for by the defendant, that the plaintiff was not entitled, on the showing made, to an assessment of any punitive or vindictive damages. *Waters v. Lumber Co.,* 115 N. C., 649; *Holmes v. R. R.,* 94 N. C., 318.

Punitive or exemplary damages, sometimes called "smart money," are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. They are not given with a view to compensation, but rather as a punishment to the defendant and as a warning to other wrongdoers. Nor are they allowed as a matter of course. *Osborn v. Leach,* 135 N. C., 628. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. In other words, to quote the language of *Hoke, J.,* in *Ammons v. R. R.,* 140 N. C., p. 200 (concurring opinion), such damages "are not allowed as a

matter of course, but only where there are some features of aggravation, as where the wrong is done wilfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights." To same effect is the holding in *Webb v. Tel. Co.,* 167 N. C., 483.

We had occasion to review the subject, somewhat in detail, in the recent case of *Tripp v. Tobacco Co.,* 193 N. C., 614, and we are content simply to refer to that case as authority for our present position. There it was said: "Whether there is any evidence, in a given case, sufficient to justify the assessment of punitive damages is a question of law for the court, and if, as here, none has been offered, it is error to submit the question to the jury." This, we apprehend, is equally applicable to the present case.

There are other exceptions appearing on the record worthy of consideration, but as they are not likely to arise on another hearing, we shall not decide them now. There was no motion to nonsuit.

For the error, as indicated, in submitting the question of punitive damages to the jury on insufficient evidence, a new trial must be awarded, and it is so ordered.

New trial.

STATE v. BATE FLEMING AND WILL FLEMING.

(Filed 10 June, 1927.)

1. Criminal Law—Entry on Lands—Statutes.

In order to convict of a misdemeanor under the provisions of C. S., 4300, for the "entry into any lands and tenements," etc., it is not necessary that the act of going on the lands be unlawful if the accused thereafter has in overpowering numbers cursed and abused the one in lawful possession, using threatening and abusive language, and where there is sufficient evidence of these facts, defendant's motion as of nonsuit is properly overruled. C. S., 4643.

2. Same—Evidence—Nonsuit.

On a motion for nonsuit in a criminal action, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. C. S., 4643.

APPEAL by defendants from *Daniels, J.,* and a jury, at January Term, 1927, of BEAUFORT. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

H. C. Carter for defendants.

CLARKSON, J. C. S., 4300, is as follows: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor."

Defendants were indicted and convicted under the above statute. From the judgment rendered, they appealed to the Supreme Court. We think there was no error in the refusal of the court below to grant the defendants' motion of nonsuit. C. S., 4643. Defendants concede the charge correct if there was sufficient evidence to support it to be submitted to the jury. On a motion for nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The testimony of the prosecuting witness was to the effect that the two defendants and one W. M. Bell were together and went into the field where he was working. They were there about 20 minutes, Bate Fleming cursing and threatening him.

"Bate (Fleming) did all the cussing and Will (Fleming) said 'You accused us of breaking that old house open.'" Prosecuting witness testified he was frightened, and "I didn't say much to him, because I knew it was not worth while with three of them there." The defendant Bate Fleming's language was profane, violent, abusive, and threatened injury to his person and property.

S. v. Gray, 109 N. C., at p. 792, is as follows: "In *S. v. Wilson,* 94 N. C., 839, and *S. v. Talbot,* 97 N. C., 494, it was held that though an entry on land was peaceable, and even with permission of the owner, if, after getting upon the premises, the defendant uses violent and abusive language and does acts calculated to intimidate, he is guilty of a forcible entry; that though 'not at first a trespasser, he became such as soon as he put himself in forcible opposition to the owner.'"

In the present case there was no weapon, but the inequality of numbers, together with the threatening attitude, was such force as was calculated to intimidate or put in fear. The language used was such as was calculated, and no doubt intended, to bring about a breach of the peace. The number indicated a demonstration of force. *S. v. Simpson,* 12 N. C., p. 504; *S. v. Davenport,* 156 N. C., p. 596; *S. v. Tyndall,* 192 N. C., p. 559.

Dr. P. A. Nicholson, a witness of the State, was asked the question: "Do you know their general reputation? The answer being, 'Yes, I have heard their reputation is good except for making liquor. They have been arrested and convicted.'" Defendants moved the court below to strike out the answer, and to the refusal, excepted and assigned error.

The assignment of error cannot be sustained. It is the accepted rule that a witness may do this of his own volition. *S. v. Butler,* 177 N. C., p. 585; *Davis v. Long,* 189 N. C., 129. *S. v. Colson,* 193 N. C., 236, is in full accord with this rule.

For the reasons given, we can find

No error.

J. K. KENNEY v. BALSAM HOTEL COMPANY.

(Filed 10 June, 1927.)

1. **Mortgages—Description of Property Pledged — Notes — Bonds — Enlargement of Terms.**

   Where the intent of a mortgage of hotel property construed in its entirety is only to pledge the lands of the mortgagor corporation as security to the payment of the bond of the mortgagor, a recitation in the bond that it "is one of a series . . . all equally secured by a deed of trust or mortgage of all the assets of said company," cannot alone have the power of extending the terms of the mortgage to embrace the personal property of the mortgagor.

2. **Process—Summons — Publication of Summons — Attachment — Nonresidents.**

   Where the real and personal property of a nonresident mortgagor has been attached for the purpose of a valid service of summons issued out of the courts of this State, as to whether the mortgagor may depend as to the real property upon the ground that it was subject to a mortgage lien of another not a party, *quere?* and *held,* the possession here of personal property by the defendant is sufficient for jurisdictional purposes.

3. **Reference—Findings of Fact—Evidence—Appeal and Error.**

   Neither the findings of fact of the referee, approved by the trial judge nor his independent action thereon, is reviewable on appeal when supported by legal evidence.

APPEAL by defendant from *Stack, J.,* at February Term, 1927, of JACKSON.

Civil action for an accounting and to recover salary alleged to be due plaintiff by the defendant, a nonresident corporation, for services rendered as clerk in the defendant's hotel at Balsam, N. C. This action was instituted 21 February, 1921, by attaching certain hotel furniture and thereafter obtaining service by publication. As the case involved a long accounting, it was referred under the statute. Exceptions were duly filed to the report of the referee, some of which were sustained, and as thus modified, the report was adopted and approved by the judge of the Superior Court, and judgment entered in favor of plaintiff for the

sum of $2,990.84, with interest. The property attached was ordered to be sold for the satisfaction of plaintiff's judgment. Defendant appeals, assigning errors.

Hannah & Hannah and Alley & Alley for plaintiff.
H. G. Robertson for defendant.

STACY, C. J. The defendant seeks to present the question as to whether the personal property herein attached is subject to the prior lien of a deed of trust, executed by the defendant 3 April, 1909, to Mrs. W. H. Wiggs to secure an indebtedness of approximately $53,000.

Without deciding whether the defendant, on the present record, is in position to raise this question, we are satisfied from a careful examination of the evidence that the judgment is fully supported by the facts found, and it is clear that the furniture attached herein is not included in the deed of trust executed to Mrs. Wiggs in 1909.

The description of the property in the deed of trust is simply "All those certain tracts or parcels of land situate, lying, and being in Scott's Creek Township in the county of Jackson," with specific calls by metes and bounds, etc., and no enlargement of this description is to be found either in the *habendum* or in the warranty clause, which would extend it to the personal property in question under the doctrine announced in *Triplett v. Williams,* 149 N. C., 394, wherein it was held that unless otherwise controlled by some arbitrary rule of law, a deed is to be construed from its four corners and the intent of the grantor, as thus interpreted, allowed to prevail. *Bagwell v. Hines,* 187 N. C., 690. True, in each of the bonds secured by said deed of trust, there is a recital to the effect that "this bond is one of a series, . . . all equally secured by a deed of trust or mortgage of all the assets of said company." But this, we apprehend, would not enlarge the terms of the deed of trust without proof of a broader intent on the part of the grantor, or some omission by mistake. *S. v. Bank,* 193 N. C., 524; *Bank v. Kaufmann,* 93 N. Y., 273.

Neither the trustee in the deed of trust nor Mrs. Wiggs, or her representative, is a party to this proceeding, and the Balsam Hotel Company, admittedly indebted to both the plaintiff and Mrs. Wiggs, is seeking by this appeal to raise a question apparently of interest alone to the creditors.

It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact, made by a referee and approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence. *Dorsey v. Mining Co.,* 177 N. C., 60. Likewise, where the judge, upon hearing and considering exceptions to a referee's report, makes different or additional findings of fact, they

afford no ground for exception on appeal, unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony upon which they are based, or some other question of law is raised with respect to said findings. *S. v. Jackson,* 183 N. C., 695, and cases there cited.

We have found no error on the record; hence the judgment will be upheld.

Affirmed.

W. B. SNEED v. STATE HIGHWAY COMMISSION.

(Filed 10 June, 1927.)

1. **State Highway Commission—Roads and Highways—Appeal and Error —Notice of Appeal—Assessments—Damages—Statutes.**

   Where lands are taken by the State Highway Commission for the construction of a State highway, on appeal from the assessment of damages by a board of appraisers duly appointed to investigate them, the clerk is required by statute, C. S., 633, to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace.

2. **Same—Courts—Supervisory Powers.**

   Where the clerk has failed to transmit the record to the court on appeal for damages assessed by the appraisers in the taking of lands for a State highway, upon notice of appeal given in proceedings under the provisions of C. S., 633, 634, the trial judge within his supervisory power may order that this be done.

3. **Appeal and Error—Fragmentary Appeal—Dismissal.**

   An appeal from the refusal of the trial court to confirm the amount of damages assessed by the board of appraisers for the taking of private lands for the building of a State highway by the State Highway Commission, is fragmentary, and will be dismissed as prematurely taken from an interlocutory order of the court.

APPEAL by plaintiff from *Stack, J.,* at April Term, 1927, of CHEROKEE.

Special proceedings for the assessment of damages caused by the taking of plaintiff's property for a right of way in the construction of a State Highway in Cherokee County.

This is but one of a number of cases growing out of the construction of the same road. By consent, one board of appraisers was appointed to investigate all the claims in the different cases and make separate reports to the clerk.

Upon the coming in of the several reports, it was agreed by counsel on both sides that formal exceptions would be waived and that appeals

would be taken only in those cases where the awards, after further investigation, were found to be unsatisfactory. Some of the cases proved to be satisfactory to both parties, hence no appeals were taken in these cases.

The reports in all the cases were heard before the clerk on 4 December, 1926, and judgments rendered thereon. The plaintiffs noted appeals in some of the cases, and these were transferred to the civil-issue docket for trial. The State Highway Commission likewise noted appeals in three of the cases, the instant case being one of them, but the clerk failed to transfer the defendant's appeals to the civil-issue docket.

The plaintiffs' appeals were tried at the April Term, 1927, at which time it was discovered that the appeals of the State Highway Commission had not been transferred in accordance with the notice given on 4 December, 1926. Whereupon, counsel for the plaintiffs moved to have the appeals docketed and dismissed for the reason that appellant had failed to have them transferred to the civil-issue docket before the January Term, 1927, which convened more than ten days after notices of appeal were given. The defendant countered with a motion that the judge order the appeals then docketed, or transferred to the civil-issue docket for trial, and that the plaintiffs' motions be denied. The motion of the defendant was allowed, to which ruling the plaintiffs excepted and appealed. Only one case has been brought up, with the understanding that the other two shall abide the judgment in this one.

J. D. Mallonee and Moody & Moody for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Ross for defendant.

STACY, C. J., after stating the case: It is the position of the plaintiff that as the defendant failed to have the clerk "transfer the case to the civil-issue docket for trial of the issues at the next ensuing term of the Superior Court" (C. S., 634), it has lost its right of appeal, and that by analogy to an appeal from a justice of the peace, where the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket (C. S., 660), and the judgment affirmed upon motion. *Blair v. Coakley,* 136 N. C., 405.

But the analogy, we apprehend, fails in at least two respects. In the first place, the appeal is controlled by C. S., 633, which requires the clerk, upon notice, to transmit the entire record to the Superior Court, and neither party is obliged to give an undertaking for costs. *R. R. v. R. R.,* 148 N. C., p. 64; *Hendricks v. R. R.,* 98 N. C., 431. In the second place, the judge of the Superior Court, in the exercise of his supervisory

power, may require the clerk to send up the appeal, or transfer the case to the civil-issue docket for trial, which seems to have been done in the instant proceeding. *Hicks v. Wooten,* 175 N. C., 597; *R. R. v. King,* 125 N. C., 454. And in the third place, the agreement of counsel on both sides to waive the filing of formal exceptions, and that appeals should be taken only in those cases where the awards, after investigation, were found to be unsatisfactory, would seem to take the case out of the hard and fast rules of procedure, if such they be. *Taylor v. Johnson,* 171 N. C., 84.

But plaintiff's appeal to this Court is premature, being, as it is, from an interlocutory order, and for this reason it must be dismissed. We have thought it better, however, to express an opinion on the question sought to be presented, a course sometimes pursued where the matter is of moment, and a decision, as here, may save the parties further litigation. *Taylor v. Johnson, supra.*

Appeal dismissed.

ADAMS & CHILDERS v. PACKER & HARRISON.

(Filed 10 June, 1927.)

Process—Summons—Nonresidents — Service — Attachment — Courts—Jurisdiction—Judgments.

Where service of summons cannot be personally had upon a nonresident or his agent sufficient for the purpose, it is necessary to a valid service by publication that he has property within the jurisidiction of our court, and that the same be attached in order to confer the jurisdiction, and in that case a judgment *in personam* has no effect, but only one *in rem* is valid.

APPEAL by plaintiffs from *Shaw, J.,* at March Term, 1927, of BUNCOMBE.

Civil action, brought by plaintiffs, citizens of North Carolina, against the defendants, citizens of the State of Pennsylvania, to recover damages for an alleged breach of contract, or broker's commissions in connection with a real estate transaction. No process has been served on the defendants and no warrant of attachment has been issued against their property situate in this State. Upon an attempted service by publication, the defendants entered a special appearance and moved to dismiss the action for want of proper service. Motion allowed, and plaintiffs appeal.

Joseph W. Little for plaintiffs.

A. Hall Johnston and W. C. Ervin for defendants.

STACY, C. J., after stating the case: In the absence of personal service duly had on a nonresident defendant in an action *in personam,* substituted service by publication is effectual only when property in this State, belonging to the defendant, is brought under the control of the court by some appropriate process, and even then such service extends only to the property seized, or brought under control of the court, as no personal judgment can be rendered in such a case. *Everitt v. Austin,* 169 N. C., 622; *Winfree v. Bagley,* 102 N. C., 515.

Speaking to the subject in *Long v. Ins. Co.,* 114 N. C., 466, *Clark, J.,* delivering the opinion of the Court, said: "Where the enforcement of a debt or other personal liability is sought by subjecting property of the nonresidents, the jurisdiction is based upon the seizure of the property, and only extends to the property attached."

And in *Hess v. Pawloski,* 71 L. Ed., ..., decided 16 May, 1927, it was said: "The process of a court of one state cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the State to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery. *Pennoyer v. Neff,* 95 U. S., 714. There must be actual service within the State of notice upon him, or upon some one authorized to accept service for him. *Goldey v. Morning News,* 156 U. S., 518. A personal judgment rendered against a nonresident who has neither been served with process nor appeared in the suit is without validity. *McDonald v. Mabee,* 243 U. S., 90."

No property having been seized or brought under the control of the court, and no personal service having been had upon the defendants, it would seem that the judgment dismissing the present action is correct, and that it ought to be upheld.

Affirmed.

C. P. FRAZIER v. BOARD OF COMMISSIONERS OF GUILFORD COUNTY ET AL.

(Filed 10 June, 1927.)

1. Constitutional Law—Schools—Taxation—Bonds—Vote of the People.

Where a legislative enactment has been duly transmitted through the proper legislative channels to the President of the Senate and the Speaker of the House of Representatives, and is filed with the Secretary of State in accordance with the requirements of law, after their signatures have thereon been placed, the passage of the act in accordance with the provisions of Art. II, sec. 23, of the Constitution of North Carolina is irrebuttably presumed, except where it falls within the provisions of Art. II, sec. 14, thereof, the latter requiring that it be passed on separate days

with the aye and no vote, and then only the appropriate Journals of each branch of legislation may alone be shown in evidence to disprove that it was not so passed, and was therefore invalid.

2. Same—Statutes—Ratification—Presumptions—County Finance Act.

Where an act has been passed by the Legislature pledging the faith and credit of the State, or of a county, etc., in accordance with Art. II, sec. 14, of the State Constitution, after adopting amendments, with respect to which the Journals are silent to the manner of their adoption, the irrebuttable presumption is that the amendments were as to immaterial matters when the act itself has been ratified in accordance with our State Constitution, Art. II, sec. 23, and unofficial memoranda attached by a rubber band to the engrossed act and not therein referred to or therein incorporated, are incompetent as evidence *per contra*.

3. Same—Notice—Newspapers—Sufficient Publication.

The provisions as to notice given to taxpayers, etc., required by sec. 10, Municipal Finance Act, of an opportunity to be heard before the county may issue bonds for various purposes, is sufficiently complied with if the several orders of the county commissioners are published in the same advertisement and a date and place fixed for passing upon the objections made, if any, separately placed in the publication and distinctly referring to each of the separate purposes.

4. Same—Counties—Agencies of Government.

While the issuance of bonds for school purposes is not for a necessary expense within the contemplation of the Constitution, and ordinarily requires the submission of the question to the voters for the issuance of county bonds for the purchase of additional lands or equipment for established public schools, this is not required when the commissioners proceed under the County Finance Act, which empowers counties, as direct subagencies of the State Government, to provide public school facilities for the children of the State for a term not less than six months of each year. Const., Art. IX, sec. 2. Art. VII, sec. 7, does not apply.

5. Same—Statutes—Length of School Term—Legislative Powers.

Our State Constitution, having required a public school system of the State to have at least six months terms in each year, leaves it to the discretionary power of the Legislature to fix terms in excess of that period. Const., Art. IX, sec. 3.

CLARKSON, J., concurring.

APPEAL by plaintiff from *Oglesby, J.*, at May Term, 1927, of GUILFORD. Affirmed.

Controversy without action submitted to the Superior Court of Guilford County upon statement of facts agreed. C. S., 626.

The question in difference between the parties to this controversy involves the validity of bonds which defendant, board of commissioners of Guilford County, proposes to issue as obligations of said county, pursuant to orders made by said board, under the provisions of "The County Finance Act," ch. 81, Public Laws 1927.

Defendant has ordered that bonds of Guilford County be issued pursuant to said act, and unless restrained and enjoined from so doing, will issue bonds of said county as follows:

1. In an amount not exceeding $750,000 for the purpose of funding certain indebtedness of said county, incurred before 7 March, 1927, for the construction of roads and bridges in said county, and evidenced by notes of the county, now outstanding.

2. In an amount not exceeding $250,000 for the purpose of highway construction and reconstruction, including bridges and culverts.

3. In an amount not exceeding $500,000 for the purpose of erecting and equipping schoolhouses and additions to schoolhouses, and acquiring land therefor, when necessary, in accordance with resolutions adopted by the board of education of Guilford County, and approved by defendant, the board of commissioners of said county.

Defendant has further ordered, as required by the provisions of said County Finance Act, that taxes sufficient to pay the principal and interest of said bonds when due shall be annually levied and collected by said county.

Plaintiff, a resident and taxpayer of Guilford County, upon the facts agreed, contends first, that the County Finance Act, under which defendant proposes to issue said bonds, is void, for that said act was not passed by the General Assembly in accordance with the requirements of Article II, sec. 14, of the Constitution of North Carolina, in that the bill which was enacted as "The County Finance Act" was amended in each House of the General Assembly, and as amended did not receive three readings, on three different days in each House, with the yeas and nays on the second and third readings entered on its journal; second, that even if said act is valid, for that said amendments were not material, said bonds, if issued by defendant will be void, for that defendant has not complied with its provisions with respect to the publication of certain notices required by said act; and, third, that even if said act is valid, for the foregoing reason, the order for the issuance of bonds for the purpose of erecting and equipping schoolhouses, etc., is void, for that the erection and equipping of schoolhouses is not a necessary expense of Guilford County, within the meaning of Article VII, sec. 7, of the Constitution, and said order provides for the issuance of said bonds without the approval of a majority of the voters of Guilford County, as required by said section 7, Article VII of the Constitution.

From judgment denying the prayer of plaintiff that defendant be restrained and enjoined from issuing said bonds, plaintiff appealed to the Supreme Court, basing his assignments of error upon his exceptions to the judgment.

Chester B. Masslich and Frazier & Frazier for plaintiff.

John N. Wilson, Attorney-General Brummitt and Assistant Attorney-General Nash for defendant.

CONNOR, J. On 7 March, 1927, a bill entitled "An Act to Provide for the Issuance of Bonds and Notes of Counties, and for Property Taxation for the Payment Thereof, with Interest," was passed by the General Assembly of North Carolina, and enrolled for ratification under the supervision and direction of the Secretary of State, as required by statute, C. S., 6108. It was thereupon signed by the presiding officers of both Houses of the General Assembly in accordance with the provisions of Article II, sec. 23, of the Constitution. It was then sent to the office of the Secretary of State, who, as required by statute, filed and published the same as a law of the State of North Carolina, C. S., 7656, and C. S., 6111. It is now chapter 81, Public Laws of North Carolina, Session 1927, and in accordance with its provisions is known and cited as "The County Finance Act."

The signatures of the presiding officers of both Houses of the General Assembly, affixed to said bill, certifying that same was duly ratified in each House, is conclusive, not only of its ratification, but also of its passage by the General Assembly of North Carolina, in accordance with the provisions of Article II, sec. 23, of the Constitution of North Carolina, *i. e.,* that the bill which was enacted as chapter 81, Public Laws 1927, was read three times in each House and duly passed and ratified by both Houses.

In *Cotton Mills v. Waxhaw,* 130 N. C., 293, it is said: "This Court has repeatedly held that the ratification of an act by the presiding officers of the two Houses of the General Assembly, declaring it to have been read three times in each House, is conclusive of such fact. *Carr v. Coke,* 116 N. C., 223, 28 L. R. A., 737, 47 Am. St. Rep., 801; *Bank v. Comrs.,* 119 N. C., 214; *Comrs. v. Snugg,* 121 N. C., 394, 39 L. R. A., 439; *Comrs. v. DeRosset,* 129 N. C., 275; *Black v. Comrs.,* 129 N. C., 121." No evidence other than the signatures of the presiding officers of both Houses of the General Assembly is required or competent to show that a bill, signed by them was passed as required by Article II, sec. 23, of the Constitution; not even the Journal, which each House is required by the Constitution to keep of its proceedings (Art. II, sec. 16), is competent to show the passage by the General Assembly of a bill introduced in either House, and its enactment as a law, in the absence of the certificate signed by the presiding officers of the two Houses, *Scarborough v. Robinson,* 81 N. C., 409; nor is the Journal of either House competent to contradict the certificate of the presiding officers that a bill was duly read in each House three times, passed on each reading,

and thereafter duly ratified by both Houses. *Carr v. Coke,* 116 N. C., 233. Both *Scarborough v. Robinson* and *Carr v. Coke* are cited and approved in *Wilson v. Markley,* 133 N. C., 616, where it is said, for a unanimous Court: "These authorities would seem to establish the law in this State, that the Court has no power to examine the Journals, and they are not competent to be received in evidence to show the passage of an act or to contradict the certificate of the presiding officers that an act had been duly read three times and passed each House of the General Assembly." In *Brodnax v. Groom,* 64 N. C., 245, this Court, in the opinion written by *Chief Justice Pearson,* said: "We are of the opinion that the ratification certified by the Lieutenant-Governor and the Speaker of the House of Representatives makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. *Lord Coke* says: 'A record, until reversed, importeth verity.'" In *Comrs. v. Snugg,* 121 N. C., 394, *Montgomery, J.,* says: "The certificate of these officers will be taken as conclusive of the several readings in ordinary legislation, even if it could be made to appear that the Journals were silent with reference thereto, because in ordinary legislation the directions of the Constitution are not a condition precedent to the validity of the act." See *Brown v. Stewart,* 134 N. C., 358, where the writer of the opinion for the Court says: "The Court has held in *Bank v. Comrs.,* 119 N. C., 214, and several recent cases, that the Journal is competent evidence to show whether the provisions of section 14, Article II, of the Constitution, have been complied with. The writer of this opinion thinks it not improper to say, speaking for himself, that unless compelled by overwhelming and controlling authority, he would hold that the principle announced in *Brodnax v. Groom,* 64 N. C., 244, is to be rigidly adhered to, save in the clearly defined exception made in *Bank v. Comrs.,* 119 N. C., 214."

The principle upon which the law in this State, with respect to the authentication of statutes enacted by the General Assembly as ordinary legislation, declared in the foregoing and other authoritative decisions of this Court, is founded, is recognized and applied by courts of other jurisdictions. In *Atlantic Coast Line Railroad Co. v. State of Georgia,* 135 Ga., 545, 69 S. E., 725, 32 L. R. A. (N. S.), 20, the Supreme Court of Georgia has held that "where an enrolled bill is signed by the presiding officers of both Houses, approved by the Governor, and deposited in the office of the Secretary of State, it will be conclusively presumed that the measure was properly put to a vote in both Houses, and that it received a constitutional majority; and the Court will not upset the act because the Journals of the Houses happen to show that it did not receive a majority of the votes of either or both branches of the Legislature." The law was thus declared, notwithstanding a provision in the Constitu-

tion of Georgia in words as follows: "No bill shall become a law unless it shall receive a majority of the votes of all the members elected to each House of the General Assembly, and it shall, in every instance, so appear on the Journal."

In 25 R. C. L., at page 895, it is said that in England it has been uniformly held that the enrolled bill is conclusive, and that the courts cannot go beyond it to the Journals or to the original draft, for the purpose of examining the contents or the passage of a law. In the United States, according to one line of cases, the enrolled bill imports absolute verity, and the courts will not look beyond it to the legislative Journals or other evidence to ascertain the terms of the statute, or whether it has been regularly enacted. "This is the rule which is usually adopted when the question is one of first impression, and it has sometimes been adopted even when it has been necessary to overrule earlier cases, holding that the Court may resort to the legislative Journal to determine whether a statute has been regularly enacted, while the courts of some of the states, although constrained by prior decisions to adhere to the Journal entry rule, have permitted themselves to question its wisdom."

On page 898 of 25 R. C. L., it is said to be the law everywhere, even in jurisdictions in which the enrolled copy of an act does not import absolute verity, that every enrolled act, regular on its face, and found in the custody of the proper officer, is presumed to have been regularly enacted, and is prima facie evidence of the law. But in some jurisdictions, while the enrolled act is prima facie evidence of the regular enactment of the law, the courts may have recourse to the Journals of either House of the Legislature for the purpose of ascertaining whether the law has, in fact, been passed in accordance with constitutional requirements. Numerous decisions are cited in the notes in support of the text.

This Court has held, uniformly, the law in this State to be that the certificate of the presiding officers of the two Houses of the General Assembly, while conclusive that a bill signed by them was passed by the General Assembly, in compliance with the provisions of Article II, sec. 23, of the Constitution, is not sufficient to show that a bill to which Article II, sec. 14, was applicable was passed in accordance with its requirements. These requirements are mandatory upon the General Assembly. It has also been held that it is competent for the courts, when the validity of an act, although signed by the presiding officers of both Houses of the General Assembly, is challenged on the ground that it was not passed in accordance with the provisions of Article II, sec. 14, to examine the Journals of both Houses to ascertain whether these requirements were complied with. The Journals are the evidence provided by the Constitution from which the Court may ascertain whether

or not the law was enacted by the General Assembly as required by its provisions. No other evidence is required, or competent. The exception to the general rule that the certificate of the presiding officers is conclusive is made because of the express provision of Article II, sec. 14, with respect to laws to which said provisions are applicable.

In *Bank v. Comrs.,* 119 N. C., 214, the decision of the Court in *Carr v. Coke,* 116 N. C., 223, is cited and approved. It is said, however, in the opinion of *Clark, J.:* "That case merely holds that when an act is certified to by the Speakers as having been ratified, it is conclusive of the fact that it was read three several times in each House and ratified. Const., Art. II, sec. 23. And so it is here; the certificate of the Speakers is conclusive that the act passed three several readings in each House, and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each House, and that the yeas and nays were entered on the Journal. The Journals were in evidence, and showed affirmatively the contrary."

This Court, when called upon to determine the validity of an act of the General Assembly, enacted "to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so," has uniformly received the Journals in evidence to show whether or not the bill for such purpose was passed in accordance with the mandatory provisions of Article II, sec. 14. Where the Journals of both Houses of the General Assembly have shown that the bill was passed in compliance with the requirements of Article II, sec. 14, an act authorizing the issuance of bonds or the imposition of taxes has been held valid by this Court; but when the Journal of either House has shown that the bill was passed without such compliance, or fails to show affirmatively that it was passed as required thereby, the act has been held void in so far as by its terms it authorized the issuance of bonds or the imposition of taxes. The Journals are conclusive as to whether or not the bill was passed as required by Article II, sec. 14. No evidence, other than the Journals, is required by the Constitution; nor will the courts receive or consider any other evidence than the Journals, when called upon to determine whether or not a law to which Article II, sec. 14, is applicable was passed in accordance with its requirements.

The Journals of both Houses of the General Assembly, Session 1927, show that the bill which was enacted as "The County Finance Act" was passed in compliance with the provisions of Article II, sec. 14. They further show, however, that said bill was amended in each House; they do not show that the bill, after the adoption of the amendments was read over again three times in each House, with the yea and nay vote on

the second and third readings entered on the Journals. Nor does the Journal of either House show the purpose or effect of the several amendments which were adopted, and thereafter included in said bill as the same was passed and ratified. In the absence of any showing by the Journals that the amendments, or any one of them, were material (*Gregg v. Comrs.*, 162 N. C., 480; *Bank v. Lacy*, 151 N. C., 3; *Comrs. v. Packing Co.*, 135 N. C., 62; *Brown v. Stewart*, 134 N. C., 357; *Glenn v. Wray*, 126 N. C., 730), the validity of the act cannot be successfully called in question, because the bill, as amended, was not again read three times in each House, with the yea and nay vote on the amended bill entered on the Journals. It is only when the bill has been amended in a material matter that it is required that the amended bill shall be read over again three times in each House, with the yeas and nays on the second and third readings entered on the Journal. It is so held in *Glenn v. Wray*, 126 N. C., 730. For the law with respect to the passage of a substitute for the original bill, see *Brown v. Comrs.*, 173 N. C., 598, and *Edwards v. Comrs.*, 183 N. C., 58.

Where the Journal of either House of the General Assembly shows only that a bill which must be passed in accordance with the provisions of Article II, sec. 14, in order to be valid as a law, was amended, and does not show the purpose or effect of the amendment, there is no presumption that the amendment was material; on the contrary, there is a presumption that the amendment was immaterial, as affecting the passage of the bill by the General Assembly. The only competent evidence to overcome this presumption is the Journal itself. In the absence of any evidence to be found in the Journal of either House as to the contents of an amendment, adopted and included in a bill to authorize the issuance of bonds or the levying of a tax, it must be taken as a fact that the amendment was immaterial in so far as the passage of the bill and its enactment as law is concerned.

In *Comrs. v. Packing Co.*, 135 N. C., 62, it is held that "the burden is always on the party who alleges that a statute was not passed according to the constitutional requirements, and he must furnish the competent evidence necessary to overcome the presumption arising from the ratification of the act." In that case, it was held that entries on the original bill were incompetent as evidence to show the passage of an amended bill. The Court declined to consider those entries as evidence, saying with respect thereto: "The Constitution requires that it should appear, not from the entries on the original bill, but from the Journal, that the bill was properly read and the necessary entry of ayes and noes was made. If the journal shows that the bill was properly passed, no evidence will be received to contradict what is therein recorded. The law requires the Journals of the General Assembly to be deposited with the

Secretary of State, and these Journals, or a copy of them, certified as provided by law, are the only evidence that can be resorted to in order to overcome the presumption arising from the ratification of the act and to invalidate it. It can be done in this way, but in no other." This statement of the law is well supported by the authorities cited, and is now reaffirmed.

It is agreed by the parties to this controversy that "a diligent search has been made to ascertain what were the four amendments said by the Senate Journal to have been offered by Senators Sharp, Hancock, Moore, and Woodson, respectively, and adopted by the Senate on 25 February, 1927. The Senate Journal does not contain any one of said amendments, nor give any clue as to what its tenor or effect may be, nor as to its materiality or immateriality. All that the most diligent search has succeeded in finding are four slips of paper, true copies of which have been transcribed on one page and attached to and made a part of this agreed case, as Exhibit 'H.' At the foot of each of said four slips of paper are stamped the words, 'Adopted 25 February, 1927,' followed by the signature of one Martin, then the principal clerk of the Senate.

"Said slips of paper are in the custody of Hon. W. N. Everett, Secretary of State of North Carolina, who, after the adjournment of the regular session of the General Assembly in 1927, took the same from a drawer in a desk in an ante-room of the Senate chamber with the consent of one Corey, who during said session had been the engrossing clerk of the Senate, and then had said slips of paper in his custody, and had attached the same by a rubber band to the cover of the original bill at the time the bill was engrossed.

"Diligent search has been made for the amendment or amendments referred to in the House Journal as having been made on the third reading in the House of Representatives. The House Journal does not contain any one of said amendments, nor give any clue as to what its tenor or effect may be, nor as to its materiality or immateriality. All that the most diligent search has succeeded in finding is a slip of paper, a true copy of which is attached to and made a part of this agreed case, as Exhibit 'I.' This slip of paper is attached to what purports to be the engrossed bill hereinabove referred to, and is in the custody of Hon. W. N. Everett, Secretary of the State of North Carolina. At the foot of the slip of paper are stamped the words, 'Adopted 4 March, 1927,' but the stamped portion is not signed or otherwise authenticated."

It is manifest that under the authority of *Comrs. v. Packing Co., supra,* these slips of paper cannot be considered by the Court as evidence showing in what respect the bill which was enacted as "The County Finance Act" was amended, either in the Senate or in the House of Representatives, for the purpose of determining whether the amend-

ments shown by the Journal to have been adopted were material or immaterial. To permit evidence of this character to be received and considered by the courts in order to sustain an attack upon the validity of an act of the General Assembly would destroy the integrity of the laws of this State, and leave its citizens, and others who rely upon statutes duly enacted by the General Assembly, in hopeless uncertainty and confusion. We find no authoritative decisions of this Court which require us to sustain the contention of plaintiff that these slips of paper are competent evidence to show in what respect the bill was amended, either in the Senate or House of Representatives. The fact that this Court has considered certain amendments, which in some instances it was agreed, and in others it was found by the judge, without objection, were adopted by the Senate or House of Representatives, when the bill was pending on its passage by the General Assembly, for the purpose of determining their materiality, does not justify the contention that *Comrs. v. Packing Co., supra,* has been ignored by this Court or repudiated as an authority upon the question now under consideration.

Plaintiff's first contention with respect to the validity of the bonds which defendant proposes to issue cannot be sustained. Chapter 81, Public Laws 1927, was enacted by the General Assembly in compliance with all pertinent constitutional requirements, as shown by the certificate of the presiding officers of both Houses of the General Assembly, and by their Journals. In the absence of evidence contained in the Journals to the contrary, we must hold that amendments, shown to have been adopted, while the bill was on its passage, were immaterial, as affecting the passage of the bill, and its enactment as a law for the purposes set out in Article II, sec. 14. Bonds issued in accordance with the provisions of said law will be valid; taxes levied to pay the principal and interest of said bonds will be lawful, and when collected, will be applicable to the payment of said bonds and interest, as provided in the law.

It does not follow as a necessary consequence of the decision in this case that the law as heretofore declared by this Court in *Glenn v. Wray, supra,* with respect to the passage of a bill to provide for the issuance of bonds, or the imposition of a tax, is modified or abrogated. The decision in this case is not inconsistent with the principle declared in *Glenn v. Wray, supra,* and applied in subsequent cases. We are here dealing only with the question as to what evidence is competent to show whether or not an amendment, shown by the Journals to have been adopted, is material, as affecting the passage of the bill as amended. We hold that the Journals only are competent as such evidence. There is no requirement in the Constitution that an amendment shall be entered upon the Journal. It is competent, however, for any member

of either House to have an amendment to a bill pending therein entered on the Journal. Const., Art. II, sec. 17. Either House may order an amendment to be so entered. No evidence, other than the Journal of that branch of the General Assembly by which an amendment was adopted, is competent to show the purpose or effect of the amendment, upon a contention involving its materiality as affecting the passage of the bill.

With respect to plaintiff's second contention in support of his prayer that defendant be restrained and enjoined from proceeding further in the matter of the issuance of said bonds, it is agreed that the clerk of defendant board of commissioners of Guilford County caused to be published copies of the three orders for the issuance of said bonds, as same were introduced at a regular meeting of defendant board on 5 April, 1927. He did not cause to be published in connection with each of said orders the statement required to be published by section 16 of the County Finance Act. The three orders were, however, published contemporaneously in the same newspaper, and appeared on the same page of said newspaper. Immediately below his certificate authorizing such proceedings, the said clerk caused to be published the statement so required. This statement, by its express terms, referred to each and all said orders. Notice was thereby given to all citizens and taxpayers that protests against the issuance of said bonds might be made at a meeting of defendant board to be held on a day and at an hour fixed by said board and stated in said notice.

It is further agreed that after the final passage by defendant board of all three of said orders, at a meeting held on 19 April, 1927, its clerk caused each of said orders, together with the notice required by section 19 of the County Finance Act, to be published.

Plaintiff contends that the publication of the orders introduced at the meeting of defendant board of commissioners was defective in that its clerk failed to publish in connection with each order the statement required by section 16 of the County Finance Act. The publication of one statement in connection with all three orders, upon the facts agreed, was sufficient as a compliance with said section. Plaintiff's second contention is not sustained. The proper publication of the notices required by the County Finance Act is mandatory, and cannot be dispensed with; we hold, however, that upon the facts agreed in the instant case, there was a proper publication, and a full compliance with the requirements of the act.

Plaintiff, by his third contention, presents for decision the question as to whether defendant board of commissioners of Guilford County may issue bonds of said county for the purpose of erecting and equipping

schoolhouses therein, under the provisions of the County Finance Act, without the approval of the majority of the qualified voters of said county.

Section 9 of the County Finance Act provides that the order for the issuance of bonds thereunder shall contain a clause stating the conditions upon which the order will become effective, and that said order shall become effective in accordance with such clause, which clause shall be as follows:

"1. If the bonds are funding or refunding bonds, that the order shall take effect upon its passage, and shall not be submitted to the voters; or

"2. If the bonds are for a purpose other than the payment of necessary expenses, or if the governing body, although not required to obtain the assent of the voters before issuing the bonds, deems it advisable to obtain such assent, that the order shall take effect when approved by the voters of the county at an election, as provided in the act; or

"3. In any other case, that the order shall take effect thirty days after the first publication thereof after final passage, unless in the meantime a petition for its submission to the voters is filed under the act, and that in such event, it shall take effect when approved by the voters of the county at an election, as provided in the act."

Section 22 of said act is as follows: "If a bond order provides for the issuance of bonds for a purpose other than the payment of necessary expenses of the county, the approval of the qualified voters of the county, as required by the Constitution of North Carolina, shall be necessary in order to make the order operative. If, however, the bonds are to be issued for necessary expenses, the affirmative vote of the majority of the voters voting on the bond order shall be sufficient to make it operative in all cases when the order is required by this act to be submitted to the voters."

In the instant case, defendant has provided in the order for the issuance of bonds for erecting and equipping schoolhouses in designated school districts in Guilford County, established in accordance with the provisions of Article IX, sec. 3, of the Constitution, that same "shall take effect thirty days after the first publication hereof, after final passage, unless in the meantime a petition for its submission to the voters is filed under said act, and that in such event it shall take effect when approved by the voters of the county at an election, as provided in said act."

No citizen or taxpayer of Guilford County filed a protest against the issuance of any of the said bonds, nor was any petition filed for a referendum on the order for the issuance of bonds for the purpose of erecting and equipping said schoolhouses. By its terms, therefore, the order became effective without submission to the voters of Guilford County.

The validity of the bonds to be issued by defendant pursuant to said order is challenged by plaintiff on the ground that said bonds are for a purpose other than the payment of necessary expenses of Guilford County, and not having been approved by the majority of the qualified voters of said county, the said bonds will be void, and taxes levied for the payment of the principal and interest of same will be unlawful. Const. of N. C., Art. VII, sec. 7.

It is well settled by authoritative decisions of this Court that the establishment or maintenance of schools is not a necessary expense of a county, city, town, or other municipal corporation, within the meaning of Article VII, sec. 7, of the Constitution of this State, and that no bonds may be issued or taxes levied by a county, city, town, or other municipal corporation for such purpose without the approval of the majority of the qualified voters therein, in accordance with the provisions of said section and article. It has been so held in *Stephens v. Charlotte,* 172 N. C., 564; *Sprague v. Comrs.,* 165 N. C., 603; *Gastonia v. Bank,* 165 N. C., 507; *Ellis v. Trustees,* 156 N. C., 10; *Hollowell v. Borden,* 148 N. C., 255; *Rodman v. Washington,* 122 N. C., 39; *Goldsboro Graded School v. Broadhurst,* 109 N. C., 228; *Lane v. Stanly,* 65 N. C., 153. There is no provision in the Constitution making it the duty of counties, cities, towns, or other municipal corporations to establish or to maintain schools. They may do so only when authorized by special acts of the General Assembly. Schools established and maintained by a county, city, town, or other municipal corporation under a special act of the General Assembly are not necessarily included within the State system of public schools. It has, therefore, been uniformly and consistently held by this Court that Article VII, sec. 7, of the Constitution is applicable to bonds issued and taxes levied by a county, city, town, or other municipal corporation for this purpose. Bonds issued or taxes levied by such municipal corporations to establish or maintain schools, without the approval of the majority of the qualified voters therein, are invalid and unlawful, because of the provisions of Article VII, sec. 7.

These decisions, however, are not determinative of the question here presented for decision. The Constitution of North Carolina does provide—and its provisions in that respect have been held mandatory—that the General Assembly shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one, Article IX, sec. 2; and that to accomplish this end, the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year, Article IX, sec. 3. It cannot be too often emphasized that the

controlling purpose of the people of North Carolina, as declared in their Constitution, is that a State system of public schools shall be established and maintained—a system of schools supported by the State, and providing for the education of the children of the State—and that ample power has been conferred upon the General Assembly to make this purpose effective. In *Tate v. Board of Education,* 192 N. C., 516, this Court has said: "It is, however, fully within the power of the General Assembly, because of the duty imposed upon it by the Constitution, 'to provide by taxation and otherwise for a general and uniform system of public schools,' to authorize and direct the respective counties of the State, as administrative units of the public school system, or as governmental agencies employed for that purpose by the General Assembly, to provide the money for such expense by taxation and otherwise, *Lovelace v. Pratt,* 187 N. C., 686; *Lacy v. Bank,* 183 N. C., 373."

Section 8 of the County Finance Act is in these words: "The special approval of the General Assembly is hereby given to the issuance by counties of bonds and notes for the special purposes named in this section, and to the levy of property taxes for the payment of such bonds and notes, and interest thereon. Accordingly, authority is hereby given to all counties in the State, under the terms and conditions herein described, to issue bonds and notes and to levy property taxes for the payment of the same, with interest thereon, for the following purposes, including therein purchase of the necessary land, and, in case of buildings, the necessary equipment: (a) Erection and purchase of schoolhouses."

The counties of the State are authorized by this statute to issue bonds and notes for the erection of schoolhouses and for the purchase of land necessary for school purposes, and to levy taxes for the payment of the same, principal and interest, not as municipal corporations, organized primarily for purposes of local government, but as administrative agencies of the State, employed by the General Assembly to discharge the duty imposed upon it by the Constitution to provide a State system of public schools. The limitations of Article VII, sec. 7, are not applicable to bonds or notes issued by a county, as an administrative agency of the State, under authority conferred by the County Finance Act, for the purpose of erecting schoolhouses, and equipping same, or purchasing land necessary for school purposes. We therefore hold that the board of commissioners of any county in the State, upon compliance with the provisions of the County Finance Act, has authority and is empowered to issue bonds or notes of the county for the purpose of erecting and equipping schoolhouses, and purchasing land necessary for school purposes, and to levy taxes for the payment of said bonds or notes, with interest on the same, without submitting the question as to whether said

bonds or notes shall be issued or said taxes levied, in the first instance, to the voters of the county, where such schoolhouses are required for the establishment or maintenance of the State system of public schools in accordance with the provisions of the Constitution. The board of commissioners is required to submit the question as to the issuance of said bonds or notes to the voters only upon a petition for a referendum, in accordance with the provisions of the act.

The mandatory provision of section 3 of Article IX, to the effect that "one or more public schools shall be maintained at least six months in every year" in each school district of the State, wherein tuition shall be free of charge to children of the State between the ages of six and twenty-one, is not a limitation as to the length of the school term; it is the minimum required by the Constitution. The General Assembly has the power to provide for a longer term for the public schools of the State. Whether the term shall exceed the minimum fixed by the Constitution must be determined from time to time by the General Assembly, in accordance with its judgment, and in response to the wishes of the people of the State. There is no provision in the County Finance Act by which the amount for which bonds or notes may be issued for the purpose of erecting schoolhouses, or purchasing land necessary for school purposes is limited to the amount required for maintaining in the several districts into which the State is divided one or more schools for a term not exceeding six months in each year. Whether such limitation should have been imposed was a matter for the General Assembly. Its absence does not affect the validity of the bonds or notes that may be issued, or of the taxes that may be levied in accordance with the provisions of said act.

We find no error in the judgment denying the prayer of plaintiff that defendant herein be restrained and enjoined from issuing the bonds which defendant proposes to issue, or levying the taxes which defendant proposes to levy. The judgment is

Affirmed.

CLARKSON, J., concurring: I heartily concur in the able and constructive opinion of the Court, written by *Mr. Justice Connor.* In the first place, it gives confidence to those persons and corporations that have or will hereafter invest their money in securities of this State, or its agencies. In the second place, it recognizes that the General Assembly, composed of the representatives of the people, and responsible to them, in its wisdom and sound judgment, may gradually and sanely enact legislation looking to a vision when equal educational advantages will be provided for all the children of this commonwealth, both urban and rural.

W. G. DIX ET AL. v. R. H. PRUITT ET AL.

(Filed 10 June, 1927.)

1. Religious Societies—Rules—Government.

Where, upon sufficient evidence, the jury finds that the rule of the Primitive Baptist Churches that when a member has been excluded from one church he cannot unite with another of the same faith without first being restored by the church of which he had been a member, is a fundamental rule and usage of all churches of that faith, the observance of this rule is mandatory on all congregations adhering to the Primitive Baptist faith.

2. Same—Control of Property.

The authority of a local Primitive Baptist church is limited by the fundamental rules, doctrines, and usages of the denomination to which it belongs, and when a group in a local congregation act in opposition to such rules, doctrines, and usages, though they are in the majority, they *ipso facto* withdraw from the lawful organization of the church and forfeit the control and use of the church property to the group which abides by the fundamental rules, doctrines, and usages.

CIVIL ACTION, before *Lane, J.,* at February Term, 1926, of ROCKINGHAM.

This was an action brought by plaintiffs for possession and control of the church property of Dan River Primitive Baptist Church, and to restrain the defendants from interfering with the use and control of said church. The pertinent facts are contained in *Dix v. Pruitt,* 192 N. C., 829, and are as follows:

"The Dan River Primitive Baptist Church was organized in Ruffin Township, Rockingham County, in 1884, and in 1900 it bought land and a church building [illegible] uses, [illegible] interest, [illegible] the conveyance made to R. H. Pruitt and W. G. Dix, as trustees, [illegible] of local church was governed by the rules, customs, and usages of the regularly constituted Primitive Baptist denomination, some of which were written and some unwritten. One of the usages is that when a member has been excluded from one church he cannot unite with another of the same faith without first being restored by the church of which he had been a member, and the church that expelled him must withdraw fellowship from any other Primitive Baptist Church that receives him in disregard of the usage. In 1920, J. R. Wilson was called by the Dan River Primitive Baptist Church as its pastor. He had theretofore been a member of the Danville Primitive Baptist Church, and had been excluded from its membership. At the time he was called by the Dan River Church, he was not a member of either of these churches. It is alleged that his credentials had been canceled, and that he was no longer qualified under the usages of the churches to serve

in the capacity of pastor. At a meeting of the Dan River Church, held in September, 1923, objection was made to Wilson as pastor, but it was contended that a majority of those present voted to retain him, and he has since continuously held possession of the church property, to the exclusion of the plaintiffs. On 9 October, 1923, the plaintiffs 'declared nonfellowship' with the defendants and those united with them in interest. In the Dan River Church there are two factions, one seeking to exclude the other, and to recover the church property, and the other retaining possession and denying the plaintiffs' right to recover.

"Issues were submitted and answered as follows:

"1. Were the plaintiffs, and those united with them, the sole and only members of the Dan River Primitive Baptist Church on 9 October, 1923? Answer: 'Yes.'

"2. Are the plaintiffs, and those united in interest with them, entitled to the possession of the Dan River Primitive Baptist Church and its records, as alleged in the complaint? Answer: 'Yes.'

"The verdict was set aside as a matter of law."

Upon the former appeal, this Court reversed the judgment of Lane, J., which set aside the verdict as a matter of law for the reason set forth in the opinion. Thereupon, at the February Term, 1927, the parties appeared before Judge Harding at the regular term of Rockingham Superior Court, who entered the following judgment:

"This cause coming on to be heard, and it appearing to the court that it was heard before a judge and jury at the February Term, 1926, of Rockingham Superior Court, and that the jury answered the issues submitted to them as follows:

"1. Were the plaintiffs, and those united with them, the sole and only members of the Dan River Primitive Baptist Church on 9 October, 1923? Answer: 'Yes.'

"2. Were the plaintiffs, and those united in interest with them, entitled to the possession of the Dan River Primitive Baptist Church and its records, as alleged in the complaint? Answer: 'Yes.'

"And it further appearing to the court that upon the coming in of the verdict of the jury, his Honor, Judge Lane, set aside the verdict as a matter of law; that the plaintiffs appealed to the Supreme Court, and that judgment was rendered in the Supreme Court that there was error in that his Honor set aside the said verdict as a matter of law, and judgment has never been entered upon the verdict of the jury appearing of record.

"It is, therefore, upon motion, ordered, adjudged, and decreed that the plaintiffs, and those united with them, were the sole and only members of the Dan River Primitive Baptist Church on 9 October, 1923. It is further ordered, adjudged, and decreed that the plaintiffs, and those united

in interest with them, are entitled to the possession of the Dan River Primitive Baptist Church and its records, the said Dan River Primitive Baptist Church consisting of the real estate described in the deed recorded in the office of the register of deeds of Rockingham County, North Carolina, in Book 128, page 97, as well as the buildings thereon, and in addition thereto, plaintiffs are entitled to the possession of all records, books, and papers of said Dan River Primitive Baptist Church now in the hands of the defendants;

"And it is ordered, adjudged, and decreed that the defendants, and those united with them, immediately surrender to the possession of the plaintiffs, and those united in interest with them, the said real estate, and the Dan River Primitive Baptist Church and its records, to the end that said real estate, church property, and records may be used for church purposes in accordance with the rules, customs, usages and faith of the Primitive Baptist Churches, and the defendants, and all persons, are now and forever enjoined from interfering with the plaintiffs, and those united in interest with them, in the use and control of the church property aforesaid, and the records thereof, and are forever enjoined from preventing the plaintiffs, and those united in interest with them, from using said real estate and the church for public worship and for church purposes, in accordance with the rules, customs, usages, and faith of Primitive Baptist Churches.

"It is further ordered that the clerk of this court, in the event the defendants fail to surrender possession as aforesaid to the plaintiffs, issue a writ of assistance directed to the sheriff of Rockingham County, directing said sheriff to take over and give to the plaintiffs the possession of said real estate, church, and records aforesaid, shall not be issued until further orders of this court.

"It is further ordered that the defendants pay the costs of this action, to be taxed by the clerk."

From the foregoing judgment the defendants appealed, assigning errors.

Sharpe & Crutchfield and King, Sapp & King for plaintiffs.
P. W. Glidewell and Brooks, Parker, Smith & Hays for defendants.

BROGDEN, J. The question of law at issue is clearly and succinctly stated in the brief of the learned counsel for defendants in the following language:

"The question in this case involves the determination of which faction of the divided congregation of the Dan River Primitive Baptist Church shall have the use, custody, and control of the church property. The division grew out of a dissension in the congregation concerning the matter of discipline and church government, and the question is pre-

sented whether the majority faction, represented by the defendants, who are in possession of the church property, have the right under the organization of the Primitive Baptist Church to continue in the possession and control, or whether they may be enjoined from interfering with the plaintiffs in the use and control of the church property, on the ground that the plaintiffs are adhering to the proper principles of government and discipline maintained in the Primitive Baptist Church, and that the defendants are not so abiding by those principles."

It was alleged in the complaint that the Dan River Primitive Baptist Church was organized in 1884, and "has at all times since then and is now a duly and regularly organized church of the Primitive Church faith." That said Dan River Primitive Baptist Church has at all times been conducted and governed by the rules, customs and usages which control Primitive Baptist churches. "And the government of said Dan River Primitive Baptist Church at all times has been the same as all other Primitive Baptist churches, being governed by the rules, customs and usages which have been adopted and which were in force among the Primitive Baptist churches, all of which had their origin in and were the outgrowth of the first or original Primitive Baptist church established in this country."

The defendants, in their answer, admit that "said Dan River Primitive Baptist Church has at all times been conducted and governed by the rules, customs and usages which control Primitive Baptist churches. It is further averred that the defendants have at all times and are now conducting the Dan River Primitive Baptist Church in exact accord with the rules, customs and usages of the original Primitive Baptist church established in this country."

Upon these allegations and admissions two questions immediately arise?

1. What are the rules, customs and usages which control Primitive Baptist churches?

2. What is the relation of these rules, usages and customs to the independent governmental sovereignty of a Primitive Baptist Church?

The rules appearing in the evidence bearing upon this controversy are as follows:

(a) All business of the church shall be decided by a majority vote, except fellowship, which shall be unanimous.

(b) We believe every church is independent in matters of discipline, and that associations, councils, or conferences of ministers or churches are not to impose on the church the keeping, holding or maintaining of any principle or practice contrary to the church's judgment.

(c) If a minority shall be grieved, at any time, by the majority, they are directed to make the same known immediately to the church, and if

satisfaction cannot be obtained, it may be necessary in that case to call for help from sister churches.

(d) Especially does the language of Christ, in Matthew 18:15-18, demonstrate that the church is the highest and last ecclesiastical authority on earth; that there can be no appeal, under the law of Christ, from the decision of the church to an presbytery or synod or general assembly, or conference, or priesthood, or prelate, or papacy, or association, or any other earthly authority.

(e) That after a church has excluded one of its members, and classed him with heathens and publicans, it is not only unscriptural, but also thoroughly absurd, to suppose that any man or set of men can, by any exercise of authority, put back such an offender in the fellowship of that church.

The last two rules were introduced in evidence from Hassell's Church History, which is recognized among Primitive Baptists as an outstanding authority on rules, usages and laws governing the Primitive Baptist Church.

The evidence tended to show that J. R. Wilson was pastor of the Dan River Baptist Church; that prior to the time he became pastor of that church he had been a member of a church of like faith in Danville, Virginia, and had been excluded from fellowship; that about two months after his exclusion he had returned to the church and requested to be reinstated, which request was denied. Thereafter, he was received into membership of the Old Mill Primitive Baptist Church. Subsequently, he became pastor of the Dan River Primitive Baptist Church. The question arose in the church as to whether Wilson could hold the office of pastor until he had been restored to membership in the identical church which had excluded him. The controversy was brought before a regular church conference and a vote taken upon the question, and a majority of the members voted to retain Wilson as pastor. The evidence is not quite clear as to the numerical strength of the two factions, but the plaintiffs concede that the Wilson faction is in the majority. The minority faction, or anti-Wilson faction, asked for advice from the association to which this church belonged, to wit, Upper Country Line. In response to this request, a conference was called. Representatives from eight churches met with the Dan River Church, without notice to the defendants, and after hearing the statement of the controversy, advised Dan River Church to declare nonfellowship with the Wilson faction upon the ground that they were in disorder, and thereupon the anti-Wilson or minority faction passed the following resolution: "*Resolved*, That we hereby declare nonfellowship for the disorderly faction or portion of Dan River Church, who fellowship and hold and stand by J. R. Wilson in disorder."

There was further evidence tending to show that thereafter the Wilson faction or majority faction had taken possession of the church property.

Hence, out of this setting, the dispute comes to this Court for determination.

All Baptist churches have the congregational system of government. They are independent sovereignties and exclusively self-governing units. They are sometimes referred to in the books and decisions as "little republics" or "independent republics." Certain it is that each church is an independent democracy, acknowledging no master save Christ, and recognizing no force except the force of its own intelligence, conscience, and judgment. Hence, it must necessarily follow that a majority of the membership in any given congregation, nothing else appearing, is entitled to control the church property and direct and control the administrative affairs of the congregation. But it is equally true that each church or congregation is an orderly unit as well as a self-governing unit, and that there are certain fundamental faiths, immemorial customs and usages and uniform practice which form a part of the church life and constitute an integral part of its function.

In other words, a majority in a Baptist church is supreme, or a "law unto itself," so long as it remains a Baptist church, or true to the fundamental usages, customs, doctrine, practice, and organization of Baptists. For instance, if a majority of a Baptist church should attempt to combine with a Methodist or Presbyterian church, or in any manner depart from the fundamental faiths, usages and customs which are distinctively Baptist, and which mark out that denomination as a separate entity from all others, then, in such case, the majority could not take the church property with them for the reason that they would not be acting in accordance with distinctively Baptist principles. Or suppose a majority of a Baptist church should determine to abandon immersion and receive members without either an individual profession of faith or baptism, such majority could not take possession of the church property and exclude the minority who remained true to the fundamental faith and practice, which through many generations of observance has become intimately and inseparably wrought into the organized life of every Baptist church.

The decisions upon the respective rights of minorities and majorities in Primitive Baptist churches and other Baptist churches are not uniform. The lack of uniformity arises from a variety of facts and circumstances upon which individual decisions are based, but the general principles of law are well established. Thus, in *App v. Lutheran Congregation,* 6 Pa., 201, it is said: "It is the duty of the Court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of

worship in practice, as also in favor of the government of the church in operation, with which it was connected at the time the trust was declared." Again, in *Schnorr's Appeal,* 67 Pa., 138, the Court said: "The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws, usages, and principles which were accepted among them before the dispute began are the standards for determining which party is right." Again, in *Mt. Zion Baptist Church v. Whitmore,* 13 L. R. A., 198 Iowa, the Court says: "If perchance a bare majority of some Baptist church should determine, on scriptural authority, their right to a plurality of wives, and, against the protests of a minority, devote the property of the church to the advocacy and practice of such a doctrine, under the claim of appellees that the church 'owes no allegiance to any man or body of men,' civil or ecclesiastical, except 'a majority of its members,' the only redress of the minority would be to retire from the church, and leave the property to the majority for such a purpose. Such a surrender of civil rights is without support on any principle of natural justice, and we believe without the sanction of any judicial tribunal." Also, in *Brundage v. Deardorf,* 55 Fed., 846, *Judge Taft, Chief Justice* of the Supreme Court, delivering the opinion of the Court, said: "The question is one of identity, and that identity is to be determined by a reference to the fundamental law of the church, which was the original contract or compact under which its organization was effected, and in pursuance of which and subject to which all the property acquired for its use became vested in the church. An open, flagrant, avowed violation of that original compact, by any persons theretofore members of the church, was necessarily a withdrawal from the lawful organization of the church, and the forfeiture of any rights to continued membership therein, and to the control and enjoyment of the property conferred on such organizations." In *Kerr v. Hicks,* 154 N. C., 265, *Clark, C. J.,* delivering the opinion, quoted with approval the following: "In church organizations, those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation."

Some of the authorities dealing with property rights growing out of divided churches are as follows: *Gewin v. Mt. Pilgrim Baptist Church,* 51 Southern, 947, Ala.; *Allen v. Roby,* 67 Southern, 899, Miss.; *Finley v. Brent,* 11 L. R. A., 214, Va.; *Mack v. Kime,* 24 L. R. A., N. S., 675, Ga.; *First Baptist Church of Paris v. Fort,* 49 L. R. A., 617, Texas; *Smith v. Pedigo,* 32 L. R. A., 838, Ind.; *Bouldin v. Alexander,* 21 Law Ed., 69; *Boyles v. Roberts,* 121 S. W., 805, Mo.; *Middleton v. Ellerson,* 78 S. E., 739, S. C.; *Monk v. Little,* 182 S. W., 511, Ark.; *Windham v. Ulman,* 59 Southern, 810, Miss.; *Nash v. Sutton,* 117 N. C., 232; *Sim-*

mons v. Allison, 118 N. C., 770; *Kerr v. Hicks,* 154 N. C., 268; *Conference v. Allen,* 156 N. C., 524; *Gold v. Cozart,* 173 N. C., 612; 8 A. L. R., 102.

The defendants offered no evidence.

Elder J. W. Gilliam, witness for plaintiffs, testified that he was clerk of the Upper Country Line Association, of which Dan River Primitive Baptist Church was a member. He testified that all the rules governing Primitive Baptists are not written; that many rules are unwritten, and further, that "the rule among our churches is that when J. R. Wilson is turned out of the church that no church of our faith and order remains a gospel church in order and holds with the said J. R. Wilson. It hasn't got a right to impose the will of the association on that church. The Dan River Church was not in disorder as a whole, but had divided, a portion of the church standing loyal in doctrine and in practice and in the government that governs our association. . . . A Primitive Baptist church can exist in doctrine and rules and practice of the Primitive Baptist denomination and never belong to any association, so long as they remain in the doctrine and in the practice that governs the orthodox Primitive Baptists."

Randolph Perdue, a minister and moderator of the Pigg River Association, testified: "In case a minister who is elected pastor at a church is turned out of the church where he holds his membership, he is turned out of all churches in the Primitive Baptist faith and order everywhere. He can only be restored by coming back to that church where he was excluded and making acknowledgments in satisfaction to that church. In case a minister is excluded and members of another church follow him before he is restored, the church is in the same relation as the man that is excluded. . . . But after a church applies to an association to be admitted into the association, and she is received, then she is a sovereign so long and so far as she remains in order, in faith, and in practice of the laws and rules of the church. . . . I say that the church is an independent body as long as she remains in order."

F. W. Keene, witness for plaintiff, testified that he had been preaching for forty-five years, and was acquainted with the laws of the Primitive Baptist Church, and that these laws are both written and unwritten. Witness further testified: "When a man has been serving a church as its pastor, has been excluded from the church in which his membership was, 'let him be unto thee as a heathen and publican,' and he is no longer in fellowship of that church; and if he be one who has been a preacher, the practice among our people is that he lay down his gift; and that all sister churches who themselves recognize that man have no further right to exercise his gift among any of the churches called Primitive Baptists or Old School Baptists. If there are members of the church who permit

him to preach while he is out of the church, and who go with him, they have departed from the order and practice of our people and are themselves in the same disorder, for they are now affiliating with that one in disorder, and have become a partaker of his disorder which he himself is in, and they are no longer recognized as being in the order of the churches of our Lord Jesus Christ. . . . The church is that faction which is holding to the order and practice and doctrine of our people. That portion of the church may be small or it may be a majority, it is counted the church in order. . . . As to questions of discipline and church government, the majority ordinarily rule; not always. The majority can turn people out, can call a pastor, can dismiss a pastor, can turn a member out, can decide to discard an old building and to build a new one. I have known the minority of the membership of a church to be contending for holding fast to the practice, the order, the doctrine of the church, a 'few good names in Sardi who have not defiled their garments' have their names there; they continue in the doctrine and practice and order of the church, and have the right to the church; others have departed from the faith."

W. G. Dix, one of the plaintiffs, testified: "The rules and regulations of the church have always been this for forty years. If a man is guilty of anything and has to be turned out of the church, he cannot be recognized in any other Primitive Baptist church until he first goes back to the church he is turned out of and is reconciled in that church." There was other testimony to the same effect.

It is the duty of this Court to determine the merits of the controversy upon the record as presented. If the testimony in this particular record is to be believed, then there is a limitation to the independent sovereignty of a Primitive Baptist church, and that limitation is the order, practice, and doctrine of the denomination; or, to state the proposition differently, according to the testimony in the record before us, a Primitive Baptist church is a sovereign, self-governing unit so long as it remains in the order, practice, and doctrine prescribed by the written and unwritten law. And further, if the evidence is to be believed, the Wilson faction or majority faction is in disorder, that is to say, it has departed from the fundamental practice and order observed and recognized by Primitive Baptists from time immemorial.

The question, therefore, is not a mere controversy as to the qualifications of a preacher. The decision of such a question would undoubtedly lie within the exclusive jurisdiction of the local church. The real issue upon the evidence is whether or not the majority of a local Primitive Baptist church can retain as pastor a man who, under the doctrine, practice, and order of the church, is not a member of the denomination at all, which he professes to serve. Under the evidence in this case, such a

situation would constitute what is termed by Primitive Baptists "disorder." This term is used by the witnesses apparently in a broad sense, signifying the recognition of and adherence to the fundamental practice and immemorial customs and usages of that denomination. Perhaps the term "church polity" might be deemed synonymous with the term "order" as employed by Primitive Baptists.

Upon the record there was sufficient evidence to be submitted to the jury upon the questions involved, and the jury, by its verdict, has found that the plaintiffs, constituting the minority faction, are "the sole and only members of the Dan River Primitive Baptist Church, and further, that said plaintiffs are "entitled to the possession of the Dan River Primitive Baptist Church and its records."

The defendants rely upon the case of *Cheshire v. Giles,* 132 S. E., 479. That case involved a controversy with the same J. R. Wilson who is the subject of the present controversy, and therefore the case is directly in point. However, an examination of the case will disclose that it was not tried upon a record similar to the one before us, or upon the same theory. In the *Cheshire case, supra,* it appeared that a number of associations condemned Wilson, and held that those who supported him were in disorder, and advised that Primitive Baptists ought to withdraw fellowship from him. The Court said: "It is only shown that they have continued as their pastor one who has been excluded from membership in another church; that the Pigg River Association has condemned this action as improper, and recognized the minority faction as the true Primitive Baptist Church at Martinsville. Now, as to this, each faction and the association are clearly within their rights, but nevertheless it does not follow, because the minority are so held to be the true Primitive Baptists at Martinsville, in the opinion of the association, that this minority is entitled to take the church property away from the majority, who refuse to accept the advisory counsel of the association." It is apparent that in the *Cheshire case, supra,* the decision was based upon the ground that the judgment of the association had no binding effect upon the local congregation, because under the Primitive Baptist order and practice the advice or judgment of the association is purely voluntary, and has no effect whatever in controlling the judgment or action of the local church. Moreover, in the *Cheshire case, supra,* section 40 of the Virginia Code was invoked. This statute provides, in substance, that in the event of division in a congregation, a majority of the membership of such congregation entitled to vote "may decide the right, title, and control of all property for such congregation." Referring to the statute, the Court says: "This statute makes it unnecessary either to review or recite the numerous cases in which similar controversies have been determined." So that the *Cheshire case, supra,* rested upon two

grounds: First, that the association had no right to control the affairs of the local church; second, that the Virginia statute, in case of division, established a statutory method of determining the possession and control of property.

Our case is upon a different footing. Our case was not tried upon the theory that the association has any power to impose its will upon the local church, or to determine which faction constitutes the true church. The question with us is whether or not the independent sovereignty of the local church is limited by adherence to the principle of order, doctrine, and practice as handed down through generations of Primitive Baptist church life. Upon the record, there was sufficient evidence of such limitation to be submitted to the jury, and the jury has returned its verdict into court in accordance with law. Whether this record properly presents or reflects the proper and established church polity of Primitive Baptists, we know not. Our decision rests solely and exclusively upon the record as presented to this Court, and in accordance with that record, and for the reasons given, we hold that the judgment of the court should be

Affirmed.

D. W. STARKEY AND WIFE v. FRANCES L. GARDNER.

(Filed 10 June, 1927.)

Deeds and Conveyances — Restrictions as to Residences — Covenants— Changed Conditions—Equity—Injunction.

The restrictions in the deed from the original owner of lands subdivided into lots that the lots thus conveyed should be used for residences and not for business or mercantile purposes, will not be enforced in equity by injunction against the prohibited use when it is made to appear that the conditions in the lapse of time have so changed that to enforce the restrictions would be detrimental to all the present owners of the property; as where originally residential property was the class thereof desirable, and the object to be obtained, but that the city had since extended its limits, paved its streets, furnished modern conveniences, water, sewerage, electric lights, etc., and the property in the neighborhood of the *locus in quo* had become built up into business property, and as such was of much greater value, and those holding under the original deeds, except the plaintiff in the suit, desired that the restrictions in their deed, in this respect, be removed.

CIVIL ACTION, tried before *Shaw, J.*, at May Term, 1927, of BUNCOMBE.

The plaintiff is the owner of lot No. 5 of Block C in the Hayes Subdivision, West Asheville Addition, Asheville, N. C. The defendant is

the owner of lot No. 4 and part of lot No. 40. Both of said lots of land front on Haywood Road. In both deeds there are restrictions against the erection of any "commercial or manufacturing establishment, or factory, or tenement, or apartment house, or house or building to be used as a sanatorium or hospital, or allow at any time any buildings erected thereon for any such purpose." It is alleged in the complaint and admitted in the answer that the defendant is now proposing to erect upon his property a building which is in violation of the restrictions set forth in the deeds under which the parties hold title, but it is alleged that said restrictions are not binding and enforceable.

The controversy was heard by Judge Shaw, who found the facts and rendered judgment as follows:

"This cause coming on to be heard at this the May Term, 1927, of Superior Court of Buncombe County, upon the complaint and answer of the defendant filed herein, and upon the other evidence which is of record, and the argument of counsel, the court finds as a fact that the plaintiffs L. D. Starkey and wife are the owners of the lands described in the complaint, and the defendant Frances L. Gardner is the owner of the land and lots situate on Haywood Road, described in the complaint and answer.

"The court further finds as a fact that about twelve years prior to the institution of this action that the defendant purchased the lands, as alleged in the complaint and answer, which lands, owned by R. P. Hayes and wife, Lucy P. Hayes, referred to in the plat described in the pleadings, were subdivided and the restrictions placed in the deeds of the purchasers, as set out in said complaint and admitted in the answer; and that said lands, so divided and sold, fronting on Haywood Road, a thoroughfare within the corporate limits of the city of Asheville, and when said lands were so platted that the same fronted on said Haywood Road, which was then a macadamized road, and was not of any value upon which to establish business houses or buildings, but was then only valuable for residential purposes.

"The court further finds as a fact that said Haywood Road is now a thoroughfare, paved, and has sidewalks abutting thereon, water and sewer lines, and that upon said road on which there were no business houses (stores, drug stores, banks, or other business buildings) at the time of the platting and sale of said lots fronting and abutting on said Haywood Road; but since said time, to wit, within the last seven to eight years, there have been constructed upon said road, and in close proximity to the property of the defendant herein, store buildings, drug store buildings, garages, automobile sales, and other business houses on said Haywood Road, and on either side of defendant's property, and the property referred to in said plat, and there have been constructed business houses,

banks, and other buildings of such nature and kind that the said Haywood Road, on which the property of the defendant is abutting, and other property described in the Hayes plat, which has restrictions written into the deeds of the purchasers of the said subdivision, is valuable as business property, and that its value as business property is worth at least one hundred per cent more than its value as residential property.

"And the court further finds from the affidavits herein that more than four-fifths of the owners of the lots in said subdivision, both fronting on Haywood Road and lateral streets and remote location, have joined with the defendant herein and ask that the restrictions herein be removed from the property referred to in the deed or deeds from R. P. Hayes and wife to the defendant, and all other owners and purchasers of said lots fronting on said Haywood Road.

"And the court further finds as a fact that it is inequitable and unjust to require the enforcement of the restrictions, for that the conditions for which said restrictions were placed in said deeds to the owners of the property situate on Haywood Road is not beneficial to the property described in said subdivision, but, on the contrary, is detrimental and injurious to the market value of said property, and that if said restrictions are permitted to continue that it will retard the advancement and upbuilding of said property for business purposes on said Haywood Road: It is therefore ordered and adjudged that, by reason of the changed condition aforesaid, the restrictions created in said deed from R. P. Hayes and wife, Lucy P. Hayes, referred to above, are no longer in effect, and that the property of the defendant described in said complaint is no longer subject to said restrictions, and that the application for injunction and restraining of the defendant, her agents or assigns, from building houses or business houses on her said property be and the same is hereby denied, and the said defendant, her agents or assigns, are not bound by the terms of said restrictions, and they are permitted to use said lands and property for any lawful purposes.

"It is further ordered that the plaintiff pay the costs of this action, to be taxed by the clerk."

From the foregoing judgment, the plaintiffs appeal.

J. Scroop Styles for plaintiffs.
Wells, Blackstock & Taylor for defendant.

BROGDEN, J. The question is this: Under what circumstances are restrictive covenants in deeds for property, originally devoted to residential purposes, rendered unenforceable?

There is no allegation in the complaint and no finding of fact by the trial judge that the Haywood Road property was the result of a general

plan or scheme other than the fact that the original deeds contained restrictions as set out in the deeds of the plaintiffs and the defendant.

The question of restrictive covenants in deeds covering property designed for residential purposes exclusively is becoming more and more an important and perplexing proposition. In all of the larger cities of the State suburban developments are multiplying, and the popularity of these developments rests upon the assurance given purchasers that they may confidently rely upon the fact that the privacy of their homes will not be invaded by the encroachment of business, and that they may further be assured that the essential residential nature and character of the property will not be destroyed. Upon this assurance our citizens are daily erecting and constructing expensive and comfortable homes, away from the noise and stress of city life, and moreover, where they can secure larger home sites for their residences and more playing space for their children. The fundamental theory upon which these developments are founded is that of equality of burden and equality of privilege; that is to say, each property owner is entitled to the same privilege from the encroachment of undesirable buildings or enterprises, and therefore each property owner is subjected to the same burden or obligation of doing nothing or permitting nothing to be done to change the essential character of the community plan. This security and freedom ought not to be destroyed by slight departures from the original plan, guaranteed and safeguarded by the restrictive covenants in the deeds under which the property is held. Nor should a property owner be held to have waived his rights and to have abandoned the protection conferred upon him by such covenants by reason of disconnected and immaterial violations of the restrictions in the conveyances. This idea is expressed in *Ward v. Prospect Manor Corp.,* 188 Wis., 534, 206 N. W., 856: "It is now generally recognized by the overwhelming weight of authority in this country that an individual lot owner is not under penalty of waiving his right to the enforcement of a restrictive covenant by his failure to take notice of such violations as do not affect him."

The English rule is stated in *Peek v. Matthews,* L. R., 3 Eq., 515, 517, cited in the *Ward case, supra,* as follows: "If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighborhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into court for the purpose merely of harassing and annoying some particular man where the court could see he was not doing it bona fide for the purpose of effecting the object for which the covenant was originally entered into."

However, it is equally true that if the character of the community has been changed by the expansion of a city and the spread of industry or other causes resulting in a substantial subversion or fundamental change in the essential character of the property, then, in such cases, equity will not rigidly enforce the restriction. In *Ward v. Prospect Manor Corp.*, 206 N. W., 856, decided 12 January, 1926, the Supreme Court of Wisconsin said: "Courts of equity will not enforce such restrictive covenants, where the character of the neighborhood has so changed as to make it impossible to accomplish the purpose intended by such covenants. This may result from circumstances over which neither plaintiff nor defendant nor other resident of the community has any control. As in *Rowland v. Miller,* 139 N. Y., 93, 22 L. R. A., 182, 34 N. E., 765, where the erection of a steam railway and the construction of a station rendered the neighborhood, and especially the defendant's property, in front of which the station was erected, unfit for use for residential purposes to which it was intended to confine the restricted area. Such changed conditions may result from the natural growth of the city, bringing industry, smoke, soot, and traffic into such close proximity to the restricted area as to render it undesirable for the purposes to which it is restricted. Such changed condition may also result from a failure on the part of the property owners to observe or comply with the terms of the covenant. These violations may be so general as to indicate a purpose and intention on the part of the residents of the community to abandon the general scheme or purpose. Under such conditions, courts of equity will not enforce the covenant."

To the same effect is *Ronberg v. Smith,* 232 Pac., 283. In that case a tract of land consisting of forty acres, situate near the State University, was platted in 1906, and lots sold with the express purpose of making it a residential district. The deeds contained restrictions to the effect that the grantees for a period of twenty years should not erect "any flat, apartment, store, business, or manufacturing building," etc. It further appeared that during the last several years material changes had occurred in the district without objection. Eight duplex or apartment houses had been constructed, two restaurants were being operated in the district, and some fifteen or twenty fraternity houses had been built. The defendant had secured a permit to build two two-family houses upon his property, adjoining the property of plaintiff. Plaintiff was denied injunctive relief. The Court quotes with approval High on Injunctions, 4 ed., sec. 1159, as follows: "In considering applications for relief by injunction against the breach of restrictive covenants contained in conveyances of real property, the courts require due diligence upon the part of the plaintiff seeking the relief, and laches or acquiescence on his part in the violation of the restrictive covenant will

ordinarily defeat his application. Indeed, equity requires the utmost diligence, in this class of cases, upon the part of him who invokes its preventive aid, and a slight degree of acquiescence is sufficient to defeat the application, since every relaxation which plaintiff permits in allowing erections to be made in violation of the covenant amounts, *pro tanto,* to a disaffirmance of the obligation."

The Supreme Court of Illinois, in *Ewertsen v. Gerstenberg,* 57 N. E., 1051, 51 L. R. A., 310, also held: "Equity will not, as a rule, enforce a restriction where, by the acts of the grantor who imposed it, or of those who derived title under him, the property, and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction, or, in short, it may be said that where, from all of the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law." 27 R. C. L., secs. 536, 537, 538 and 540. *Stevenson v. Spivey,* 110 S. E., 367; 21 A. L. R., 1276, and note; Tiffany Real Property, sec. ed., vol. 2, pp. 1456-1458.

This Court has not decided the question involved in this appeal. The only intimation contained in our law occurs in *Bailey v. Jackson,* 191 N. C., 61, in these words: "There is highly respectable authority for the position that a restriction of this kind is not necessarily void because it purports to be perpetual, though it is not impossible that conditions may arise which would impel a relaxation of the rule." Citing 18 C. J., 401.

The weight of authority is to the effect that if substantial, radical and fundamental changes have taken place in a development protected by restrictive covenants that courts of equity will not enforce the restriction. The underlying reason is, we apprehend, that such changes destroy the uniformity of the plan and the equal protection of the restriction. For instance, if a residential development should, in the course of time, by the growth of a city or other cause, become valuable as business property and business houses should indiscriminately invade the development, then the restriction would bear unequally upon the various owners and equity would not permit the entrenching of such inequality.

In our case, the court finds as follows: "The court further finds as a fact that said Haywood Road is now a thoroughfare, paved, and has sidewalks abutting thereon, water and sewer lines, and that upon said road on which there were no business houses (stores, drug stores, banks or other business buildings) at the time of the platting and sale of said lots fronting and abutting on said Haywood Road; but since said time,

to wit, within the last seven to eight years, there have been constructed upon said road, and in close proximity to the property of the defendant herein, store buildings, drug-store buildings, garages, automobile sales, and the other business houses on said Haywood Road and on either side of defendant's property, and the property referred to in said plat, and there have been constructed business houses, banks, and other buildings of such nature and kind that the said Haywood Road on which the property of the defendant is abutting, and other property described in the Hayes plat, which has restrictions written into the deeds of the purchasers of the said subdivision, is valuable as business property, and that its value as business property is worth at least one hundred per cent more than its value as residential property.

And the court further finds from the affidavits herein that more than four-fifths of the owners of the lots in said subdivision, both fronting on Haywood Road and lateral streets and remote location, have joined with the defendant herein and ask that the restrictions herein be removed from the property referred to in the deed or deeds from R. P. Hayes and wife to the defendant, and all other owners and purchasers of said lots fronting on said Haywood Road."

Upon the findings of the trial judge three outstanding facts appear: First, that the property affected by the restrictions has undergone a total change, in that Haywood Road has become business property instead of residential property. Second, that more than eighty per cent of all the owners of the property affected have waived or abandoned the restrictions contained in the deeds. Third, that the restrictive covenants are not beneficial to the property described in the subdivision, but on the contrary are detrimental and injurious.

Applying, therefore, the established principles of law to these predominant facts, we hold that, upon the record as presented, the judgment of the court was correct.

Affirmed.

HIGHLAND COTTON MILLS v. RAGAN KNITTING COMPANY; RAGAN KNITTING COMPANY v. J. H. ADAMS; AND KERNERSVILLE KNITTING COMPANY v. RAGAN KNITTING COMPANY.

(Filed 10 June, 1927.)

1. Corporations—Officers—Contracts—Fraud—Voidable Contracts.

A contract, made and entered into between two corporations by the president of both, who is a director and stockholder in each, is not void but voidable, depending upon whether the contract was made in good faith and for a sufficient consideration, and one of these corporations who seeks to have it set aside upon the grounds that the other had received an unfair advantage, has the burden of proof.

2. Same—Shareholders—Ratification.

Where a corporation has entered into a contract with another corporation, through one who is the president, a director and stockholder in both, and in its action it is established that the other has received an undue advantage, it may not recover damages when it is made to appear that by its conduct, or otherwise, its own stockholders had ratified and approved the contract after knowing its terms and receiving the benefits.

3. Same—Partial Performance of Contract—Damages.

Where two manufacturing corporations have entered into the performance of a contract for the exchange of certain machines, and the exchange is partly made, but as to some of the machines it cannot be carried out for the fact that they had been sold to others, the action, to that extent, sounds in damages.

4. Costs—Actions—Suits—Equity—Statutes.

An action upon contract sounding in damages is one at law, and the costs are taxable against the losing party, C. S., 1225, and the principle involved in certain proceedings in equity, where this matter lies within the discretion of the trial judge, C. S., 1243, is not applicable.

APPEALS of Highland Cotton Mills, J. H. Adams, and Kernersville Knitting Company from judgment of Superior Court of GUILFORD County, signed by *Webb, J.*, on 20 January, 1927, in the above-entitled actions, which were consolidated for trial and judgment, by consent.

Reversed on appeal of Kernersville Knitting Company; modified and affirmed on appeals of Highland Cotton Mills and J. H. Adams.

Three actions entitled as above, pending in the Superior Court of Guilford County were, by consent of all parties, consolidated and referred for trial. The report of the referee, setting out his findings of fact and conclusions of law, with exceptions thereto duly filed, came on for hearing before his Honor, James L. Webb, judge presiding, in the Superior Court of Guilford County. All the findings of fact were affirmed; all the conclusions of law, except the third, with respect to the date from which Ragan Knitting Mills was entitled to recover interest on its judgment against Kernersville Knitting Company, were approved. The third conclusion of law, as modified by the court, was approved.

From judgment upon the report of the referee, as modified by the court, Highland Cotton Mills, J. H. Adams, and Kernersville Knitting Company appealed to the Supreme Court.

Roberson & Haworth, Peacock, Dalton & Lyon, and Brooks, Parker, Smith & Hayes for Highland Cotton Mills, for J. H. Adams and Kernersville Knitting Company, appellants.

D. H. Parsons, King, Sapp & King, John N. Wilson and Frazier & Frazier for Ragan Knitting Company, appellee.

CONNOR, J. The action entitled "Highland Cotton Mills v. Ragan Knitting Company" was commenced on 5 May, 1923, to recover of Ragan Knitting Company, defendant therein, the sum of $5,259.31, with interest thereon from 14 May, 1921, the balance alleged to be due on an account for hosiery yarns sold and delivered by plaintiff to defendant, pursuant to a contract evidenced by writing dated 16 April, 1920.

Defendant, in its answer, admitted the contract and the delivery by plaintiff and the acceptance by defendant of the yarns pursuant to said contract, as alleged in the complaint; it further admitted that after crediting the account for said yarns with sums paid thereon by defendant, there was a balance of $5,259.31, as alleged by plaintiff.

In defense of plaintiff's recovery in this action, defendant alleged that J. H. Adams, president of Ragan Knitting Company, and also at the time president of Highland Cotton Mills, taking advantage of his position as president of the former company, had wrongfully and fraudulently caused defendant to enter into a contract with the latter company for the purchase of a quantity of yarns from plaintiff, largely in excess of the reasonable requirements of defendant, and at prices greatly in excess of fair and reasonable prices for said yarns, the said Adams acting therein in the interest not of defendant, but of plaintiff, Highland Cotton Mills; that as the result of such wrongful and fraudulent conduct on the part of said J. H. Adams, defendant, Ragan Knitting Company, had sustained loss and damage in an amount much greater than the sum which plaintiff seeks to recover of defendant in this action. Defendant prays judgment that plaintiff take nothing by its action, and that it recover of plaintiff its costs.

Upon his findings of fact, pertinent to the defense relied upon by the defendant, the referee makes his first conclusion of law in words as follows:

"That the contract for the purchase of yarns sued on by the Highland Cotton Mills in its action against the Ragan Knitting Company was and is a legal contract and binding on the Ragan Knitting Company and the settlement between the Highland Cotton Mills, Inc., and the Ragan Knitting Company is legal and binding, and that the Ragan Knitting Company is indebted to the Highland Cotton Mills, Inc., in the sum of $5,259.31 on account thereof, together with interest from 14 March, 1921."

Pursuant to said conclusions of law, judgment was rendered "that the Highland Cotton Mills, Inc., have and recover of the Ragan Knitting Company the sum of $5,259.31, together with the interest from 14 March, 1921, this being the amount found by the referee as due from the Ragan Knitting Company to the Highland Cotton Mills, Inc."

The action entitled "Ragan Knitting Company v. J. H. Adams" was commenced on 7 February, 1924, to recover of defendant, J. H. Adams, large sums of money as damages for losses sustained by plaintiff, Ragan Knitting Company, resulting from the wrongful, negligent and fraudulent conduct of the said J. H. Adams, in the performance of his duties as president of plaintiff company.

Plaintiff alleged that said J. H. Adams, taking advantage of his position as president of plaintiff company, wrongfully, negligently and fraudulently caused the said company to enter into contracts and agreements with other corporations, of which said Adams was at the time also president, and in which he had large financial interests as a stockholder; that these contracts and agreements were unfair and hurtful to plaintiff, and in the interest of and advantageous to the corporations in whose behalf the said Adams, as president of plaintiff company, wrongfully, negligently and fraudulently procured them to be made, and that by reason of the wrongful, negligent and fraudulent conduct of the said Adams, as set out in the complaint, plaintiff has suffered losses in large sums, for which plaintiff is entitled to recover of defendant, J. H. Adams, damages as demanded in the complaint. Defendant, J. H. Adams, in his answer, denied all the material allegations of the complaint.

Upon his findings of fact, pertinent to plaintiff's cause of action against defendant, J. H. Adams, the referee makes his second conclusion of law in words as follows:

"That the said J. H. Adams, having acted in good faith and without fraud or negligence in all of the transactions with said Ragan Knitting Company, and all losses of the Ragan Knitting Company, so far as the said J. H. Adams was concerned, being remote and speculative and attributable to causes other than his dealings with the said Ragan Knitting Company, and there being no time limit fixed to his agreement to either buy raw material or sell the product of said Ragan Knitting Company, and said agreement being terminable at will, the said J. H. Adams is not indebted to the Ragan Knitting Company in any sum whatever."

The foregoing conclusion of law was approved by the court, and judgment rendered accordingly.

The action entitled "Kernersville Knitting Company v. Ragan Knitting Company" was commenced on 1 March, 1924, to recover of defendant, Ragan Knitting Company, the sum of $679.49, the balance due to plaintiff on an exchange of knitting machines, between plaintiff and defendant, made on or about 8 April, 1921.

Defendant, in its answer to the complaint, admitted that it had received, on or about 8 April, 1921, from plaintiff, knitting machines,

valued by plaintiff at $11,963.02, and had delivered to plaintiff knitting machines, also valued by plaintiff at $11,283.53, and that the difference between these valuations is $679.49; it denied, however, that there had been a valid contract between plaintiff and defendant for the exchange of these machines at said valuations; defendant, upon the allegations of its answer, set up a counterclaim in its behalf against plaintiff, and demanded judgment that it recover of plaintiff, upon such counterclaim, the sum of $128,084.56, with costs. Defendant prayed that this action and the action entitled "Ragan Knitting Company v. J. H. Adams," then pending in the Superior Court of Guilford County, be consolidated and that the actions be tried together. These actions, together with the action entitled "Highland Cotton Mills v. Ragan Knitting Company" were, by consent of all parties, consolidated and referred to a referee for trial. At the trial before the referee the answer of J. H. Adams, in the action in which Ragan Knitting Company was plaintiff and J. H. Adams was defendant, was treated as the reply of plaintiff, Kernersville Knitting Company, to the counterclaim.

Upon his findings of fact, relative to the cause of action of the Kernersville Knitting Company against Ragan Knitting Company, and to the counterclaim of the latter company against the former, the referee makes his third conclusion of law in words as follows:

"That the exchange of machinery between the Ragan Knitting Company and Kernersville Knitting Company, not being fair towards the Ragan Knitting Company, and said exchange being to the advantage of the Kernersville Knitting Company at the expense of the Ragan Knitting Company, and no contract being consummated with reference thereto, and the Ragan Knitting Company having sold a portion of its machines, and having rebuilt others of the machines received in said trade, which have been changed and used by it, the said Ragan Knitting Company is entitled to recover of the Kernersville Knitting Company the difference in the reasonable market value of the machines so exchanged at the time of the said trade, to wit, the sum of $8,867.28, with interest from 1 April, 1921."

Pursuant to said conclusion of law, as modified by the court with respect to the date from which interest shall be recovered, judgment was rendered "that the Ragan Knitting Company have and recover of the Kernersville Knitting Company the sum of $8,867.28, with interest from the date of the judgment."

It was further ordered by the court "that the costs of this action be taxed by the clerk of the Superior Court of Guilford County as follows: One-fourth of said costs to be taxed against Ragan Knitting Company; one-fourth against Highland Cotton Mills; one-fourth against Kerners-

ville Knitting Company, and one-fourth against J. H. Adams. This in the discretion of the court."

There are no assignments of error upon either of the appeals to this Court based upon exceptions to the judgment of the Superior Court in so far as the findings of facts made by the referee are affirmed therein.

The appellant, Kernersville Knitting Mills, excepted to that portion of the judgment which is in the following words:

"It is, therefore, ordered by the court that the Ragan Knitting Company have and recover of the Kernersville Knitting Company the sum of $8,867.28, this being the difference found by the referee between the reasonable market value of the machines exchanged by the Ragan Knitting Company and the Kernersville Knitting Company at the date of the exchange." Appellant's first assignment of error is based upon this exception. The portion of the judgment excepted to is in accordance with the referee's third conclusion of law, as approved by the court.

The referee bases his third conclusion of law upon his findings of fact that the exchange of machines was "not fair towards the Ragan Knitting Company; that said exchange was to the advantage of the Kernersville Knitting Company at the expense of the Ragan Knitting Company." Upon these findings he concludes that there was no contract between said companies relative to said exchange, the exchange having been made without any valid contract therefor, and it now being impracticable for either company to return the machines which it received from the other, the referee concludes that the Ragan Knitting Company is entitled to recover of the Kernersville Knitting Company the difference in the market value of said machines at the date of the exchange, to wit, the sum of $8,867.28.

The validity of the contract between said companies, as alleged by the Kernersville Knitting Company, in accordance with which the exchange of said machines was made, is called in question by the Ragan Knitting Company upon its allegation: first, that the execution of said contract by it was procured by the wrongful, negligent and fraudulent conduct of its president, J. H. Adams, acting therein in the interest of the Kernersville Knitting Company, of which he was also at the time president; and, second, that the contract and exchange made in accordance with its terms was unfair, and to the advantage of the Kernersville Knitting Company and at the expense of the Ragan Knitting Company by reason of the valuation of the machines of the respective companies, made for the purpose of the exchange. These are the only grounds upon which the Ragan Knitting Company challenges the validity of the contract, or of the exchange made by said companies in accordance with its terms.

With respect to J. H. Adams, in relation to said contract and exchange, both as president and as a stockholder in said companies, the referee found facts as follows:

"84. That the exchange of machinery between the Ragan Knitting Company and the Kernersville Knitting Company, so far as the said J. H. Adams was concerned in the same, was in good faith, without fraud or negligence, and in the exercise of his best judgment."

"98. That the said Adams personally and individually made no profit out of the machinery trade as aforesaid, and the same was made by him in good faith, and in the exercise of what he thought at the time to be wise and for the best interest of both companies involved; that there was only a slight difference in his holdings of stock in the Ragan Knitting Company and in the Kernersville Knitting Company in value at the time of said exchange."

"99. That there is no competent evidence of any losses on account of any of the dealings of the said Adams with the said Ragan Knitting Company with regard to the said machinery exchange, or otherwise, but said losses were due to causes over which he, the said Adams, had no control, and such losses, if any, are speculative and remote."

With respect to the machines which were exchanged by said two companies, the referee found facts as follows:

"77. That the transfer machines received by the Ragan Knitting Company from the Kernersville Knitting Company, in the exchange of machinery aforesaid, were standard machines in general use in the manufacture of hosiery; that the K. G. machines received by the Kernersville Knitting Company from Ragan Knitting Company were also standard machines in general use in the manufacture of hosiery."

"82. That the said transfer machines received by Ragan Knitting Company from Kernersville Knitting Company made an unusual amount of seconds, but that this condition to a large extent was caused by a failure on the part of the machinist at the Ragan Knitting Company to properly adjust what is known as the 'sinker cam,' said adjustment being such as could have been easily made by an experienced machinist with little or no expense, and also to some extent to untrained labor."

"86. That it was difficult to obtain trained help for these transfer machines, and there was trouble in getting them adjusted, so as to eliminate seconds and waste."

"87. That when operated properly the said transfer machines were capable of doing good work; that the making of seconds depends upon the yarn used, the operator and the superintendent of the machinery, as well as the machine itself, and at times these transfer machines were not properly adjusted."

"97. That said exchange of machinery was brought about by the said J. H. Adams in good faith, and without fraud or negligence on his part as aforesaid, but unintentionally on his part the purported agreement for the exchange of machinery was, so far as the price was concerned, unfair to the Ragan Knitting Company, and it is found as a fact that the Kernersville Knitting Company profited in said trade at the expense of the Ragan Knitting Company."

With respect to the valuation of the machines for the purpose of the exchange by said companies, the referee found that the superintendent of Ragan Knitting Company, and a representative of Kernersville Knitting Company agreed upon said values prior to the exchange, and that J. H. Adams, as president of the Kernersville Knitting Company, on 8 April, 1921, addressed a letter to the Ragan Knitting Mill, setting out in detail the machines selected by them for the exchange, and the values placed thereon by them for the purpose of such exchange. This letter was received by the Ragan Knitting Company soon after its date, and placed by it in its files, where it remained until the trial before the referee. The exchange was made in accordance with the terms set out in the letter of J. H. Adams, dated 8 April, 1921. No objection to said terms was made by the Ragan Knitting Company, its officers, directors or stock holders, until after the commencement of the action by Kernersville Knitting Company against Ragan Knitting Company on 1 March, 1924.

In *Hospital v. Nicholson,* 189 N. C., 44, it is said by this Court, in the opinion written by *Adams, J.:* "When an officer or director of a corporation purchases or leases its property, the transaction is voidable, not void, and will be sustained only when openly and fairly made, for an adequate consideration. The presumption is against the validity of such contract, and when it is attacked, the purchaser or lessee must show that it is fair and free from oppression, imposition and actual or constructive fraud. Firmly established in our jurisprudence is the doctrine that a person occupying a place of trust should not put himself in a position in which self-interest conflicts with any duty he owes to those for whom he acts; and as a general rule he will not be permitted to make a profit by purchasing or leasing property of those toward whom he occupies a fiduciary relation without affirmatively showing full disclosure and fair dealing. Upon this principle it is held that a director who exercises a controlling influence over codirectors cannot defend a purchase by him of corporate property on the ground that his action was approved by them." This statement of the law, and its application to a sale of corporate property to an officer or director is approved in *Manufacturing Co. v. Bell,* 193 N. C., 367. It is there held that such sale is not void; it is voidable, however, when it is found

as a fact that the sale was not properly authorized by the corporation, or that it was not made in good faith for a fair consideration, or that it was not free from the taint of imposition, undue advantage or fraud.

The foregoing principle, and its application is not restricted to a sale or conveyance of corporate property to its officer or director personally; it may be invoked to set aside a sale or conveyance made to a corporation in which its officer or director is interested as a stockholder.

In *Geddes v. Anaconda Copper Mining Co.,* 254 U. S., 590, 65 L. Ed., 425, it is said: "The relation of directors to corporations is of such a fiduciary character that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation; and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness; and when a sale is involved, the full adequacy of the consideration. Especially is this true, where a common director is dominating in influence or character. This Court has been insistently emphatic in the application of this rule, which it has declared is founded in soundest morality, and, we now add, in the soundest business policy."

However, in *Corsicanan National Bank v. Johnson,* 251 U. S., 68, 64 L. Ed., 141, it is said: "That two corporations have a majority, or even the whole membership of their boards of directors in common does not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders; and certainly where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where, in addition to this, the personal interests of the directors or any of them would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud."

The fact that J. H. Adams, at the time of the contract and of the exchange made pursuant thereto, was the president of both Ragan Knitting Company and Kernersville Knitting Company, does not, of itself, invalidate either the contract or the exchange. *Leathers v. Janney,* 41 La. Anno., 1120, 6 So. 884, 6 L. R. A., 661; 14a C. J., 125, and cases cited in notes. Neither the contract nor the exchange was void; they were at most voidable. Upon the facts found by the referee and affirmed by the court, with respect to the conduct of J. H. Adams in relation to the contract and exchange, neither can be declared void

upon the first allegation of Ragan Knitting Company, upon which it attacks the validity of the contract and exchange.

The fact as found by the referee, and affirmed by the court, to wit, that the contract and exchange was unfair to the Ragan Knitting Company, by reason of the valuation of the machines exchanged, sustains the second allegation upon which the Ragan Knitting Company attacks the validity of said contract and exchange. The referee, however, found further facts from which it appears that Ragan Knitting Company, its officers (other than J. H. Adams), its directors, and its stockholders, with full knowledge of all the terms of said contract and exchange, acquiesced in and ratified both the contract and the exchange.

The referee found the following facts, which were affirmed by the court:

1. After the contract had been entered into by Ragan Knitting Company and the Kernersville Knitting Company for the exchange of certain machines, in accordance with the terms set out in the letter addressed to Ragan Knitting Company by J. H. Adams, as president of Kernersville Knitting Company, dated 8 April, 1921, the Ragan Knitting Company, with its own trucks, transported its machines to the mill of the Kernersville Knitting Company at Kernersville, N. C., and in return for same transported the machines of the Kernersville Knitting Company to its own mill at Thomasville, N. C.

2. The Ragan Knitting Company installed in its mill at Thomasville the machines which it received from the Kernersville Knitting Company; it rebuilt some of said machines and sold some of them to another corporation; and it continued to use the machines which it retained for nearly three years, without complaint or notice to the Kernersville Knitting Company that it, its directors or stockholders were dissatisfied with said exchange.

3. At the time of the exchange in April, 1921, the Ragan Knitting Company failed to deliver to Kernersville Knitting Company four machines which it should have delivered to said company; more than eighteen months thereafter, and after J. H. Adams had ceased to be president of said Ragan Knitting Company, the said four machines were, by the order of its general manager, delivered to the Kernersville Knitting Company, in accordance with the terms of the exchange as set out in the letter of J. H. Adams, dated 8 April, 1921.

Upon these and other pertinent facts found by the referee and affirmed by the court, we must hold that the exchange made in April, 1921, by said companies, even if same was unfair with respect to the valuation of said machines, was ratified by the Ragan Knitting Company, its officers, directors and stockholders.

In *San Diego O. T. & P. B. R. Co. v. Pac. Beach Co.,* 112 Cal., 53, 44 Pac., 333, 33 L. R. A., 788, it is said: "Ratification of a contract between corporations having common directors is shown where one company has entirely performed its part of the contract, and the other has performed a part of it, and cannot restore anything or place the other party, in whole or in part, in *statu quo,* especially when the stockholders have expressly approved the contract."

There was error in approving the referee's third conclusion of law; the assignment of error based upon the exception to that portion of the judgment in which it is ordered that Ragan Knitting Company have and recover of the Kernersville Knitting Company the sum of $8,867.28, is sustained. The action is remanded to the Superior Court of Guilford County in order that judgment may be entered in accordance with this opinion.

The assignments of error in the appeals of Highland Cotton Mills, J. H. Adams, and Kernersville Knitting Company, with respect to the payment of costs, must be sustained.

The consolidated action, tried before the referee, in which the judgments are rendered, is not an equitable proceeding, in which costs may be allowed or not, in the discretion of the court. C. S., 1243. The three actions were consolidated and referred for trial, by consent of all parties. Without such consent, no order of reference could have been made. The costs in each action should be taxed just as they would have been had there been no reference. Costs should be allowed to the party in whose favor judgment is rendered. C. S., 1225.

The judgments in the action entitled "Highland Cotton Mills v. Ragan Knitting Company," and the action entitled "Ragan Knitting Company v. J. H. Adams" must be modified. In the former action the plaintiff, and in the latter action, the defendant, is entitled to recover his costs. As thus modified, the judgments are affirmed.

The judgment in the action entitled "Kernersville Knitting Company v. Ragan Knitting Company," having been reversed, upon plaintiff's first assignment of error on its appeal to this Court, no order is now made with respect to the costs. Judgment will be rendered in the court below with respect to costs in accordance with this opinion.

In appeals of Highland Cotton Mills and J. H. Adams
Modified and affirmed.

In appeal of Kernersville Knitting Company
Reversed.

T. D. BRYSON, D. R. BRYSON AND MARY G. TIPTON v. J. W. McCOY, JOSEPH T. McCOY AND LAURA B. JARRARD.

(Filed 10 June, 1927.)

1. **Deeds and Conveyances—Taxation—Sheriff's Deed—Statutes—Descriptions.**

   A description of land in a list of sale for taxes as "Beaverdam Township name T. D. Bryson heirs, acres 400, amount $10.00," when the land consisted of an undivided one-half interest in 70 acres, in 200 acres, in 331 acres, and in 200 acres, under separate State grants, is not a sufficient description under C. S., 7911; C. S., 8019, and a sale thereunder will be void.

2. **Same—Constitutional Law.**

   For a valid sale of land for taxes, the tax list and notice of sale must contain a sufficiently definite description of the land to allow the land to be identified, and to be notice to those persons whose interest is to be affected, and if the description is not so definite, a sale thereunder will be void as not complying with the statute, and as taking property without giving notice and as not affording those whose property is sold an opportunity to be heard. State Constitution, Art. I, sec. 17.

3. **Same—Latent Ambiguity—Parol Evidence—Contracts.**

   Where a description in the tax list and notice of sale for taxes is "400 acres, Beaverdam Township," etc., the ambiguity therein is not one appearing upon the face of the tax list and notice of sale, but latent, and parol evidence to identify the lands is inadmissible.

4. **Same—Statutes—Interpretation—In Pari Materia.**

   With regard to the sale of lands of the delinquent taxpayer for the payment of taxes due thereon, construing C. S., 8034, with secs. 7911 as to listing, and 8019, requiring that the land be sufficiently described, it is *Held*, that the rule of evidence excluding parol evidence to identify the land with the description in case of latent ambiguity is not changed in such instances. For the purchaser's remedy, see C. S., 8037.

APPEAL by plaintiffs from *Harding, J.*, and a jury, at November Term, 1926, of CHEROKEE. New trial.

This is an action by plaintiffs against defendants, and the prayer of plaintiffs is "that the defendants be required to set up and exhibit their alleged claim of title; that the same be declared to be a cloud upon the title of these plaintiffs to said land, and as such removed and declared void." C. S., 1743.

On 16 February, 1886, the State of North Carolina issued to A. T. Davidson and T. D. Bryson grants for certain lands situate in District No. 5 of Cherokee County, N. C.

(1) Grant No. 7568, Entry No. 947, describing the land by metes and bounds, containing 70 acres. Entered 1 June, 1853.

(2) Grant No. 7569, Entry No. 100, describing the land by metes and bounds, containing 200 acres. Entered 12 March, 1883 (1853).

(3) Grant No. 7570, Entry No. 99, describing the land by metes and bounds, containing 331 acres. Entered 12 March, 1883 (1853).

(4) Grant No. 7571, Entry No. 2851, describing the land by metes and bounds, containing 200 acres. Entered 22 April, 1854.

All of the grants were duly registered.

One of the grantees, Col. T. D. Bryson, died in 1889 and left three children surviving him, the plaintiffs in this action: (1) Judge T. D. Bryson, (2) Dr. D. R. Bryson, (3) Mrs. Mary G. Bryson, who married W. H. Tipton, who claim to be the owners of one-half interest in the tracts of land above mentioned.

The parties to the controversy admitted (1) none of the plaintiffs, Brysons, or their sister ever lived in Cherokee County, N. C.; (2) that no one has been in the actual possession of the lands in controversy within the last twenty-five years; (3) that Judge T. D. Bryson is not a resident of Cherokee County, but is a resident of Swain County.

Defendants deny that Judge T. D. Bryson, Dr. D. R. Bryson and Mrs. Mary G. Bryson are the owners of one-half interest in the lands, but claim that they own the one-half interest; that J. E. McCoy, their ancestor, purchased said land for taxes at a public tax sale on 7 May, 1906; that all the laws in reference to sale of land for taxes have been complied with and a sheriff's deed regularly made to their ancestor fully describing the land, and they are now the owners. The defendants further set up a claim for taxes paid on the land since the purchase of the land at tax sale by their ancestor, said taxes paid by their ancestor J. E. McCoy, P. E. Nelson, his administrator, and the defendants, his heirs at law. They pray that if the tax title should be defective, the taxes so paid out be declared a lien on the land, and that a commissioner be appointed to sell the land to pay said taxes.

The land was sold under the following advertisement:

"DELINQUENT TAX SALE.

"North Carolina—Cherokee County.

"The undersigned tax collector will sell on Monday, 7 May, 1906, at the courthouse door in Murphy, to the highest bidder for cash, at public outcry the following lands upon which taxes for the year 1905 have not been paid, the same being listed for taxation in the name and for the amount given below, with costs in each case, to wit:

"Beaverdam Township.

Name	*Acres*	*Amount*
T. D. Bryson heirs (many others not pertinent).	400	10.00

"(Signed) T. N. BATES, *Sheriff and Tax Collector.*"

Extracts from tax list of 1905 for Beaverdam Township, Cherokee County, referring to the listing of the lands in suit for taxation:

"18. T. D. Bryson Heirs, 400 acres, 800. valuation, Aggregate value of Real Estate 800. Value of real estate and personal property 800," etc.

The land was valued at $800, and purchased by the defendants' ancestor, J. E. McCoy, for $10.00.

The issues submitted to the jury and their answers thereto were as follows:

"1. Are the plaintiffs, the heirs at law of Col. T. D. Bryson, the owners of the land described in their complaint filed in this action as alleged? Answer: No.

"2. Is the tax deed set out in the complaint a cloud upon the title of plaintiffs to the land described in the complaint, as alleged? Answer: No."

At the close of all the evidence the court below instructed the jury that if they believed the evidence to be true, as testified to by the witness to answer the first issue No, and the second issue No, which was done by the jury.

Plaintiffs made numerous exceptions and assignments of error, and appealed to the Supreme Court. The only one necessary to be considered: "The court erred in directing the jury to answer the first issue No, and the second issue No."

M. W. Bell for plaintiffs.
Edmund B. Norvell and F. O. Christopher for defendants.

CLARKSON, J. The court below instructed the jury that if they believed the evidence to be true as testified to by the witnesses to answer the first issue No and the second issue No. In this we think there was error. The instruction should have been the reverse. The main question in the case, and the only one necessary for the determination is the question as to whether the land was *listed properly* and *definitely described.*

This action presents a basic, fundamental principle. Article XIV, part sec. 1, Const. of U. S., is as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, sec. 17, Const. of N. C., is as follows: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

"That the Constitution is the 'law of the land,' in the sense that no act of either department of the government which violates its provisions or exceeds its powers can be enforced to deprive the citizen of his life, liberty or property, is a fundamental truth." "'The law of the land' has been construed to be synonymous with 'due process of law.'" "Notice and hearing are essential to constitute 'due process of law,' or 'the law of the land,' and it is necessary that a party be cited and have his day in court, upon which he may appear and defend himself, his rights, or his property." "It is an inviolable principle of the common law that every one is entitled to notice, in any judicial or *quasi*-judicial proceeding, by which his interest may be affected." Connor and Cheshire, Const. of N. C., Anno., pp. 55, 56, 58; *Markham v. Carver,* 188 N. C., p. 615.

With these basic or fundamental principles well known, the Legislature of North Carolina, Public Laws 1901, ch. 558, sec. 25, enacted: "No sale of real property for taxes shall be considered void on account of the same having been charged in any other name than that of a rightful owner, if said property be in other respects sufficiently described." See Revisal of 1905, vol. 1, sec. 2894, and C. S., 8019, practically the same.

The gist of the action *"if such real estate be in other respects sufficiently described."*

Black on Tax Title (2 ed.), ch. 10, part sec. 208, says: "One of the most important requisites in the notice or advertisement is that it should contain an adequate and accurate description of the lands to be sold. If this is omitted, or if the description given is insufficient and imperfect, the notice is fatally defective and the tax sale void."

"The delinquent list must contain such a description of the several parcels of land that may be identified with reasonable ease and certainty, both in order that the owner may know that it is his land which is returned as delinquent and that intending purchasers may know what properties are to be offered for sale." 37 Cyc., p. 1295.

Cooley on Taxation, vol. 3 (4 ed.), part sec. 1416, says: "Notice of the sale must describe the lands to be sold. This is the most important of the usual requisites of notice of sale. The requisites for a description in the assessment roll have been given heretofore. In the notice, as in the assessment, there is precisely the same necessity that the description shall be sufficiently definite to identify the land in order that the owner may be apprised of the peril to which his interests are exposed."

The question arises: Is the land listed properly or "in other respects sufficiently described" to come within the statute founded on *due process of law or the law of the land?* We think, in listing and in the advertisement, the land is not sufficiently described.

In the present action the land was listed and described as "T. D. Bryson heirs, 400 acres, 800. valuation, aggregate value of real estate 800."

In the *Notice of Sale* the land was described: "Beaverdam Township —name T. D. Bryson heirs, acres 400, amount 10.00." From the record, T. D. Bryson, the ancestor of the plaintiffs, did not own 400 acres of land in Beaverdam Township. He owned an undivided one-half interest in 70 acres, in 200 acres, in 331 acres, and in 200 acres, according to the grants. The principle of *Id certum est quod certum reddi potest* does not apply.

In 10 R. C. L., part sec. 262, it is said: "The authorities are agreed that extrinsic evidence is admissible to explain a latent ambiguity in a written instrument." Sec. 263, in part, says: "Where the ambiguity is not latent, and raised by extrinsic evidence, but patent, or apparent on the face of the instrument, the prevailing view is that parol evidence is not admissible to explain such ambiguity. The means to be employed in the solution of the patent ambiguity are to be collected from the face of the instrument alone in which it originated; and in this service the context, and every legitimate rule of exposition, may be enlisted and used in obedience to the maxim, *'Ut res magis valeat, quam pereat,'* but parol testimony, or extraneous proof of any kind, is deemed to be inadmissible. When the court, having looked to the circumstances of the parties, the subject-matter of the instrument, and all proper collateral facts, remains uncertain as to what the meaning of the written words is, a patent ambiguity is held to appear, which parol evidence cannot aid." *Green v. Harshaw,* 187 N. C., p. 213; *Douglas v. Rhodes,* 188 N. C., p. 580.

The description in the listing and advertisement is a "feather on the water."

In *Harris v. Woodard,* 130 N. C., p. 580, the description was as follows: "The description in a mortgage of 'a certain piece or tract of land, grist mill and all fixtures thereunto, and one storehouse, 28 by 100 feet long, lying and being in Brassfield Township, Granville County, North Carolina, and adjoining the lands of Anderson Breedlow, J. C. Usry, and Dora Harris, said lot to contain three acres,' there being 40 acres in the tract and nothing to segregate the three acres out of the 40 acres, is too indefinite to be a conveyance of any three acres, and the mortgage was void as to the land." The Court said, at p. 581: "The statute, Laws of 1891, ch. 465 (sec. 1 is C. S., 1763, sec. 2 is C. S., 992), applies only where there is a description which can be aided, but not when, as in this case, there is no description." *Smith v. Proctor,* 139 N. C., 314; *Patton v. Sluder,* 167 N. C., p. 500; *Watford v. Pierce,* 188 N. C., 430; *Bissette v. Strickland,* 191 N. C., p. 260.

In *Cathey v. Lumber Co.,* 151 N. C., at p. 595, it is said: "The deed under which defendant claims does not purport to convey the whole of a described tract of land, but only a certain number of acres thereof, to wit, '324 acres of land, part of a certain tract of land composed of Nos. 3044, 3097, and 3098, in Graham County.' The boundaries of the entire tract, from which 324 acres are to be taken, are set out with exactness, and the entire tract, as stated in the deed, contains 724 acres. The deed furnishes no means by which the 324 acres can be identified and set apart, nor does the instrument refer to something extrinsic to it, by which those acres may be located. It is self-evident that a certain part of a whole cannot be set apart unless the part can be in some way identified. Therefore, where a grantor undertakes to convey a part of a tract of land, his conveyance must itself furnish the means by which the part can be located; otherwise, his deed is void, for it is elementary that every deed of conveyance must set forth a subject-matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the deed refers."

In *Higdon v. Howell,* 167 N. C., at p. 456, it is said: "The description in said deed is as follows: 'undivided half interest in and to a certain piece, tract or parcel of land lying and being in the county (of Jackson) aforesaid, on the waters of Savannah Creek, being that covered by State Grant No. 504, containing 200 acres, more or less.' There was no further description, nor any description by metes and bounds. Grant No. 504 was a 640-acre tract, and it does not appear what 200 acres of the 640-acre tract were intended to be conveyed by this deed. This is not a conveyance of a whole tract of land, mistaking the quantity of land stated therein, but it is an attempt to convey an undivided half interest in an uncertain 200-acre tract lying somewhere within the bounds of said Grant No. 504, which was for 640 acres. The attempted conveyance is therefore void for uncertainty, even if it were valid in other respects."

The defendant cites us to what *Justice Walker* said in *Rexford v. Phillips,* 159 N. C., at p. 217. We quote, as cited: "If the owner should give a mistaken description, the irregularity may be cured by the sheriff's deed." This is only a part of what the learned *Justice* said. We quote the full, at p. 217: "If the owner, or any other person or officer authorized to list the property should give a mistaken description of the same, the statute provides that the irregularity may be cured, or in certain cases disregarded, if the description is sufficiently definite 'for any interested person to determine what property is meant or intended by the description,' in which case the defective description may be perfected in the sheriff's deed. . . . Such a description of land as we have in this case is too vague to give to anyone notice of the land assessed for taxation; it is no description at all, as it could be applied

to any land in the township." The entire citation covers the position here taken—no interested person could determine "what property is meant or intended by the description."

Revisal, 2909 (C. S., 8034), cannot aid defendants. It must be construed *in pari materia* with Rev., 5225 (C. S., 7911) as to listing property and with Rev., 2894 (C. S., 8019), *supra,* which distinctly says, and by clear implication implies, that the listing of the real estate is void if it is not sufficiently described. Water cannot rise above its source. It is said in *Rexford v. Phillips, supra,* at p. 221: "There is no substantial change in the law construed in *Warren v. Williford, supra* (148 N. C., 474), which expressly holds that those provisions apply only when the tax deed is valid and has passed a title, and not when, being void, it has conveyed no title. Discussing substantially the same provision, *Justice Connor* said, in *Warren v. Williford,* 148 N. C., 479: 'We do not think that this case comes within the language of section 20, Laws of 1901 (Rev., sec. 2909). It is true that, construing this section, this Court said, in *McMillan v. Hogan,* 129 N. C., 314: "The taxes due must be paid, which the law requires as a condition precedent to contest—in the title carried by the deed by authority of the statute." The defendant, having obtained his deed in violation of the express terms of the statute, acquired no title. As was said in *Matthews v. Fry, supra* (141 N. C., 582), "As the making of a proper affidavit was a condition precedent to the defendant's right to call for a deed, with which he has not complied, he has not acquired title to the land." The deed was simply void, and defendant was not entitled to avail himself of the provisions of the statute intended to protect purchasers at tax sales.' *Jones v. Schull,* 153 N. C., 521. The same principle must apply, as the language is the same, to the subsequent provision of Rev., sec. 2909 (C. S., 8034), that the person who questions 'the title acquired by the sheriff's deed' must first show that he had title to the property at the time of the sale. *Eames v. Armstrong,* 146 N. C., 5. Rev., sec. 2909 (C. S., 8034), corresponds with Laws of 1901, ch. 558, sec. 20, which was construed in *Warren v. Williford, supra." Edwards v. Lyman,* 122 N. C., p. 741; *Price v. Slagle,* 189 N. C., 757; *Collins v. Dunn,* 191 N. C., p. 429; *Dunn v. Jones,* 192 N. C., 253. From a careful consideration of the action, we hold that the tax title is void.

If a purchaser at tax sale desires, he can get an unquestioned title under C. S., 8037, by foreclosing as in actions governing the foreclosure of mortgages. *Price v. Slagle, supra,* at p. 766; *Drainage Comrs. v. Epley,* 190 N. C., p. 672. Under the statute, a good tax title can be obtained by sale, but the statute must be strictly followed.

No question arises in the action as to the statute of limitations or adverse possession.

For the reasons given, there must be a

New trial.

W. H. LEDFORD, BY HIS NEXT FRIEND, W. E. LEDFORD, v. TALLASSEE POWER COMPANY, H. F. STARK, WILL DEREBERRY, AND JAMES CONNOR AND CHARLIE CONNOR, THE SAID JAMES CONNOR AND CHARLIE CONNOR DOING BUSINESS AS THOMAS CONNOR & SONS.

(Filed 10 June, 1927.)

1. Evidence—Motions—Nonsuit—Circumstantial Evidence.

Where various elements of a fact to be proven are so related and interwoven as to be sufficient when taken together to reasonably lead to a conclusion in the minds of the jury as to the existence of the fact and amounting to more than a scintilla, upon the defendant's motion as of nonsuit they are to be taken in the view most favorable to the plaintiff, with every reasonable intendment therefrom, and the motion will be denied.

2. Evidence—Master and Servant—Employer and Employee—Negligence—Safe Place to Work—Motions—Nonsuit.

Where there is evidence tending to show that the plaintiff, a youth of seventeen years, inexperienced in such matters, was employed by the defendant company to render services in a tunnel it was making to connect the waters of two streams for furnishing additional power for its plant, and was ordered by the vice-principal of the defendant to enter the tunnel after an excavating explosion in the course of his employment, under threat of a discharge if he disobeyed, and that he was permanently injured from poisonous gas thus produced: *Held*, under the principle that it is the nondelegable duty of the master to furnish his employee a safe place to work an issue is raised for the determination of the jury, and defendant's motion as of nonsuit will be denied.

3. Same—Parties—Nonsuit as to Alter Ego — Actions — Nondelegable Duty.

Where there is evidence tending to show that the master had negligently failed to furnish his servant a safe place to work, which proximately caused the injury in suit, and the vice-principal or *alter ego* of the master has been joined in the action, the dismissal of the action as to the *alter ego* does not affect the right of the plaintiff to recover of the master for its failure to perform its nondelegable duty.

4. Same—Safe Appliances—Questions for Jury.

Where there is evidence tending to show that the plaintiff, in the course of his employment, was injured by poisonous gases resulting from explosions in excavating a tunnel for the defendant, that the ventilation was insufficient, and for like work the method known, approved, and in general use was to force, by a power-driven machine, air through the tunnel at a length of one thousand feet, which had the effect of avoiding the danger, evidence that the tunnel was not quite so long, and *per contra*, leaves the question of the defendant's actionable negligence to the jury, under the principle that the master owed a duty, under the rule of the prudent man, to furnish his servant a safe place to work.

APPEAL by defendant, Tallassee Power Company, from *Stack, J.*, and a jury, at January Term, 1927, of CHEROKEE. No error.

This is an action for actionable negligence, brought by plaintiff against the defendants for injuries sustained. The evidence, in substance: The Tallassee Power Company, a corporation, was connecting the Cheoah River with Tennessee River by means of a tunnel through the mountain. When some distance in the tunnel, about 12 August, 1926, some 350 or 400 sticks of dynamite were exploded in the head of the tunnel. Will Dereberry, the superintendent, who was head foreman for defendant H. F. Stark, ordered the plaintiff W. H. Ledford, a boy about seventeen years of age, some hours after the explosion, before the smoke had cleared away, to go to the head of the tunnel to help clean out muck and debris. The boy was working there about 30 minutes and fell, gassed. He was taken out of the tunnel unconscious. Five or six others had been taken out of the tunnel gassed. Since then he has had smothering in his chest and bleeding at his lungs. He received his pay checks from plaintiff H. F. Stark. It was alleged that there was no means of ventilation at the time of the injury.

W. H. Ledford, the boy, testified in part: "The smoke was coming out of the tunnel when I went in. I saw the smoke coming out of the pile of muck. When I saw this Dereberry told me to clean out the muck and set up the drill, and I knew it was to clean out the muck or quit, one or the other."

Dr. N. B. Adams, an expert, and the doctor who attended plaintiff, testified that it was gas poisoning—monoxide gas. That it caused leakage of the heart and the condition is permanent. "His disability is total. On account of the condition of his heart, it would be dangerous for him to attempt to do manual labor."

J. H. Emery, for plaintiff, testified in part: "The tunnel starts at the dam, Tallassee Power Company dam. I suppose the dam forces the water right into the tunnel." The plaintiff then asked the following question: "Q. Who is building that dam?" The defendant objects, objection overruled, and the defendant excepts. "A. Tallassee Power Company. The other end of this tunnel empties into the Tennessee River just above the Tapoco Dam. That is the Tallassee Power Company people's dam. I could not tell the distance. I have had some 20 years experience in tunnel and underground work." The plaintiff then asked the following question: "Q. Are you familiar with the means approved and in general use for ventilating tunnels similar to this one?" The defendant objects, objection overruled, the defendant excepts. "Q. What are they, Mr. Emery?" "A. The fans generally used for tunnels and mines, electric fans. There were no fans in this tunnel up to 12 July. I left there on 12 July, last year. When I left the tunnel must have been something like 800 to 1,000 feet from the mouth to its head. There was no shaft opening to let in the air, except the main

entrance. The compressed air was used for the purpose of running drills. I could not tell what compressed air is more than it is confined down until it has a power something like steam." The plaintiff then asked the following question: "Q. What damage, if any, is it any different after it is compressed to what it was before, if you know?" The defendant objects, objection overruled, and defendant excepts. "A. It has not the tendency of pure air for a man to exist on. Q. What, Mr. Emery, if you know anything about Tallassee Power Company conveying men to this tunnel to work?" The defendant objects, objection overruled, defendant excepts. "On their railroad from Tapoco to their dams on the trains. These trains have the words Tallassee Power Company on them." On cross-examination: "When I said fans were in general use in mines, I meant after it reached a certain depth. There will be no use in installing them at first."

The plaintiff then offered in evidence paragraph of the complaint in the case of E. G. Ledford, by his next friend, against H. F. Stark, Tallassee Power Company, Will Dereberry, James Connor, and Charles Connor, doing business as Connor & Sons, in the following language: "That Tallassee Power Company is a corporation, and at present, among other things, is engaged in building a power dam in the county of Graham, and driving and constructing a tunnel through the mountain between the Cheoah River and the Tennessee River, and was so engaged at the time of the grievance hereinafter complained of." The answer of the Tallassee Power Company to the paragraph is in the following words: "It is admitted that Tallassee Power Company is a corporation and engaged in building a power dam in Graham County, but it is denied that it individually is constructing a tunnel through the mountain, as alleged in said paragraph." Defendant Tallassee Power Company duly made exception.

As a defense, the defendants plead contributory negligence and assumption of risk. At the close of the evidence the defendant Tallassee Power Company moved for judgment as of nonsuit. Motion overruled, defendant excepts, and assigns this as its exception. Motion for nonsuit as to Thomas Connor & Sons allowed.

W. T. (Will) Dereberry, defendants' witness, testified: "As a usual rule, we drive a tunnel as far back as we can handy without using any ventilation. They don't usually use any ventilation until they drive the tunnel 1,000 or 1,500 feet back."

At the close of all the evidence, the defendants Tallassee Power Company, Will Dereberry, and H. F. Stark renewed their motion for judgment as of nonsuit. Judgment was denied, and each defendant excepted.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint, and if so, which ones? Answer: 'Yes, Tallassee Power Company.'

"2. Did plaintiff, by his own negligence, contribute to his injury? Answer: 'No.'

"3. Did the plaintiff voluntarily assume the risk, as alleged in the answer? Answer: 'No.'

"4. What damage, if any, is the plaintiff entitled to recover from the defendants? Answer: '$3,000.' "

Numerous exceptions and assignments of error were made, and to the exceptions before stated, and appeal taken to the Supreme Court. The necessary ones will be considered in the opinion, and further necessary facts.

Moody & Moody for plaintiff.
R. L. Phillips for defendants.

CLARKSON, J. Rules of Practice in the Supreme Court, 192 N. C., p. 853, part Rule 28, is as follows: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him."

The exceptions to the evidence stated in the statement of case under the foregoing rule will be taken as abandoned. These exceptions are not assigned as error in appellant's brief, and the rule ignored.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The first contention made by defendant Tallassee Power Company: "Was there sufficient evidence to connect Tallassee Power Company with the accident by showing that it owed the plaintiff any duty whatever?" We think there was more than a scintilla of evidence, and sufficient to be submitted to the jury. The evidence is circumstantial in its nature. In reference to such evidence, it is frequently argued that one twig is easily broken, but another is added, then another, and the whole together is hard to break. The twigs standing alone are weak, together strong, so with circumstantial evidence. "An old man on the point of death summoned his sons around him to give them some parting advice. He ordered his servants to bring in a faggot of sticks, and said to his eldest son: 'Break it.' The son strained and strained, but with all his efforts was unable to break the bundle. The other sons also tried, but none of them was successful. 'Untie the faggots,' said the father, 'and each of you take a stick.' When they had done so, he called out to them: 'Now

break,' and each stick was easily broken. 'You see my meaning,' said their father. Union gives strength." Æsop's Fables.

The Tallassee Power Company, H. F. Stark, and Will Dereberry are all sued as joint *tort feasors.* In doing work, boring a tunnel, or any class of work, as a matter of common knowledge, this can be done by parties working together or as independent contractors.

What are the circumstances in the present action connecting defendant Tallassee Power Company with carrying on the work? As the exceptions are abandoned, the evidence: (1) A tunnel was being bored through the mountain to connect Cheoah and Tennessee Rivers. The tunnel started at defendant Tallassee Power Company's dam. The Tallassee Power Company was building that dam. What was the dam for? To force the water into the tunnel being built—the water, when forced through the tunnel, flows or empties into the Tennessee River above another dam, the Tapoco Dam. This dam also is owned by defendant Tallassee Power Company. This tunnel being built with a flume is continuous when completed and connects the two dams of defendant. (2) The Tallassee Power Company had trains which had "Tallassee Power Company" on them. These trains ran from Tapoco to the defendant Tallassee Power Company's dam, and carried employees to this tunnel to their work. "I never saw any employees get passes." (3) Plaintiff offered in evidence part of the pleading-complaint in suit of E. G. Ledford by his next friend against H. F. Stark, Tallassee Power Company, and others, charging that the defendant Tallassee Power Company was engaged in building a power dam and drilling and constructing a tunnel between the Cheoah and Tennessee rivers—the same tunnel in which plaintiff sustained his alleged injuries. In answer to this charge, defendant Tallassee Power Company admits it is engaged in building a power dam, "but it is denied that it *individually* is constructing a tunnel through the mountain, as alleged." The implied admission is that it is not *individually* done by it, but in conjunction with others. The pleading was competent, although in another case—a declaration of the party. 22 C. J., sec. 374 (3); *Bloxham v. Timber Corp.,* 172 N. C., 37; *Alsworth v. Cedar Works,* 172 N. C., p. 17; *Pope v. Allis.* 115 U. S., p. 353.

The twigs altogether, the circumstantial evidence taken together, is sufficient to be submitted to the jury. *Hancock v. Southgate,* 186 N. C., p. 281.

The second position taken by defendant Tallassee Power Company: "Does the verdict, absolving the direct employer from liability, also absolve Tallassee Power Company, even if found to have been connected with the work?"

In the present action, plaintiff relies not only on the negligent order of Will Dereberry, the superintendent, in ordering plaintiff into the poisonous monoxide gas in the tunnel, but also that the defendant Tallassee Power Company did not use due or reasonable care in regard to the place plaintiff was to work.

As stated in *Riggs v. Mfg. Co.,* 190 N. C., at p. 258, citing numerous authorities: "It is well settled in this State 'That an employer of labor in the exercise of reasonable care must provide for his employees a safe place to do their work, and supply them with machinery, implements and appliances safe and suitable for the work in which they are engaged, and keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision.'" *Robinson v. Ivey,* 193 N. C., 805.

The jury could have excused the defendants, other than the Tallassee Power Company, on the negligent order of Will Dereberry, and rendered the verdict on the failure to use due or reasonable care in regard to the place plaintiff was required to do his work.

Connor, J., in *Nichols v. Fibre Co.,* 190 N. C., at p. 5, well says: "Liability of the master may be either primary, as arising from injuries caused by breach of duty which the master owes, and which he cannot delegate, or secondary, as arising from the maxim *qui facit per alium facit per se.* 'Where several grounds of liability are alleged, proof of one will be sufficient to authorize a recovery.' 20 R. C. L., and cases cited in note."

39 C. J., sec. 1602, at p. 1368, lays down the principle thus: "The foregoing principles have no application except in cases where the liability of the master is based solely on the wrongful acts of the servant who is acquitted. If the liability is not so based, a finding that the act of the particular servant was not wrongful does not prevent the rendition of a verdict against the master on the acts of other servants shown to be wrongful, and for which the master is liable on the doctrine of *respondeat superior.* So, a verdict against the master and an acquittal of the servant will be sufficient to sustain a judgment against the master where the act resulting in the injury complained of was committed under the express command of the master, or where the master and servant are sued jointly for injuries resulting from the negligence of both, and there is evidence of negligence on the part of the master distinct from the alleged negligent act of the servant. In these circumstances, a verdict of acquittal of the servant is not inconsistent with a verdict holding the master liable, and does not vitiate it."

The third position taken by Tallassee Power Company, that there was no evidence of negligence on its part. There was a conflict in the evidence as to how many feet had been tunneled into the mountain when the

injury was alleged to have occurred. The injury is alleged to have taken place on 12 August, 1926. The witness J. H. Emery testified that he left the tunnel on 12 July, 1926, about one month before the injury. "When I left, the tunnel must have been something like 800 to 1,000 feet from the mouth to its head. There was no shaft opening to let in air except the main entrance." Will Dereberry, defendant's witness, testified: "As a usual rule, we drive a tunnel as far back as we can handy without using any ventilation. They don't usually use any ventilation until they drive the tunnel 1,000 or 1,500 feet back." This testimony was in corroboration of Emery's testimony that ventilation was used after the tunnel was 1,000 feet. There was evidence *pro* that the ventilation at the depth plaintiff was working was foul and bad, and *contra*. In 39 C. J., sec. 488, the rule is laid down as follows: "It is the common-law duty of the operator to use ordinary care to furnish sufficient ventilation in the mine for the safety of his employees." *Robinson v. Ivey,* 193 N. C., at p. 813.

In *Hall v. Chair Co.,* 186 N. C., at p. 470, it is said: "Defense is interposed chiefly upon the ground that the machine was very simple; that the danger, such as it was, was open and obvious, and that the plaintiff assumed the risk of his injury. There was also a plea of contributory negligence. In fact, the pleas of assumption of risk and contributory negligence were both submitted under the second issue; and this, under authority of *Hicks v. Mfg. Co.,* 138 N. C., p. 333, is a matter which must be left largely to the legal discretion of the presiding judge."

In *Fleming v. Utilities Co.,* 193 N. C., at p. 266, it is said: "Instructions must be considered as a whole, and if, as a whole, they state the law correctly, there is no reversible error, although a part of the instruction considered alone may be erroneous." *Beal v. Coal Co.,* 186 N. C., at p. 754.

The briefs of both parties are well prepared and helpful.

From a careful consideration of the record, we can find

No error.

WILLIE BUCKNER, BY HIS NEXT FRIEND, F. F. FLOYD, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 25 June, 1927.)

1. Evidence—Nonsuit—Negligence—Contributory Negligence—Last Clear Chance—Signals—Warnings.

Evidence tending to show that the plaintiff was employed by a road construction company to unload crushed rock from defendant railroad company's car at a siding, detached from the locomotive, to be used in the construction of a highway, and at the dinner hour was reclining with his

back under an unloaded car, leaning against the sills of the track, with his legs projecting several feet from the side of the car, and without the customary signal or warning the defendant's locomotive suddenly, and without the knowledge of the plaintiff, attached itself to the train containing the car under which the plaintiff was reclining, surrounded by and talking and laughing with a number of others who had likewise stopped work for the noon hour, and that the attaching of the locomotive caused the car to run over and injure the plaintiff's hand and arm that were resting upon the rail: *Held*, upon defendant's motion as of nonsuit sufficient to take the case to the jury upon the issues of the defendant's actionable negligence, the plaintiff's contributory negligence, and the doctrine of the "last clear chance." *Watts v. R. R.*, 167 N. C., 345, cited and distinguished.

2. Negligence—Last Clear Chance—Burden of Proof.

Where the doctrine of the last clear chance is relied on by the plaintiff in an action for damages against a railroad company for a personal injury alleged to have been proximately caused by its negligence, the burden of proving the issue is upon him.

APPEAL by defendants from *Harding, J.*, at October-November Term, 1926, of SWAIN. No error.

Civil action to recover damages for personal injuries. The issues submitted to the jury were answered as follows:

1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff by his own negligence contribute to his injury? Answer: Yes.

3. Notwithstanding the negligence of the plaintiff, could the defendants have avoided the injury by the exercise of ordinary care? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover? Answer: $5,500.

From judgment upon the verdict defendants appealed to the Supreme Court.

Moody & Moody and McKinley Edwards for plaintiff.
Thomas S. Rollins for defendant.

CONNOR, J. On 17 December, 1925, plaintiff, at that time about twenty years of age, was employed by Howard Construction Company as a truck-driver. On said day he was engaged in hauling crushed stone from cars placed by defendant, Southern Railway Company, on its side-track at Nantahala, in Swain County, North Carolina. These cars had been placed on the side-track by defendant in order that their contents—crushed stone—might be unloaded therefrom and hauled on trucks by employees of Howard Construction Company out on Highway

No. 10, where said company was engaged in the performance of its contract with the State Highway Commission for the construction of said highway.

During the morning of said day plaintiff had driven his truck to said cars for the purpose of loading same with crushed stone. While waiting to get his load, plaintiff and other employees of Howard Construction Company, who were there for the same purpose, built a fire near the side-track. It was a very cold day, and said employees stood and sat about the fire to keep warm. Soon after eating his dinner, plaintiff sat down on a cross-tie of the side-track, under the edge of an empty car. He leaned against the rail, extending his arms on both sides, so that his hands rested on the rail. His legs and body projected out from under the car about three feet toward the fire. A number of his fellow-employees—about twelve or fifteen—were standing about the fire, near the cars on the side-track. They were all laughing and talking, waiting for the trucks to be loaded. Some of the cars had been unloaded, and were empty.

While plaintiff was sitting under the edge of the car, one of defendant's engines came from the main line into the side-track for the purpose of removing therefrom cars which had been unloaded. This engine approached the car under which plaintiff was sitting at a rate of speed not exceeding five miles per hour. One of defendant's employees, at work about the engine, called to the men about the fire, warning them of the approach of the engine. No signal was given by bell or whistle that the engine had come upon the side-track and was about to couple up with the empty cars. The engine struck the car under which plaintiff was sitting and caused its wheels to run upon and injure his hand and arm. As the result of this injury plaintiff's left arm has been amputated near the shoulder.

Plaintiff, as a witness in his own behalf, testified as follows: "I don't know that a man on the train could have seen me, but he could have seen my feet and legs sticking out. A man could see my legs and my body. There was a whole crowd standing there around the fire—ten or twelve. They were standing all around the fire by me. All were not standing in front of me. I was lying back with my hands on the track under the car. Men were standing on both sides of the fire. I was just lying down like that, with my shoulders against the rail. I thought that if they came into the side-track they would ring a bell or blow a whistle and give us signals to keep out of the way. I was just sitting there, and never thought of any train coming in without giving a signal or ringing a bell. I thought I could sit there until it came time for my truck to be loaded. I did not hear the train, and did not know that an engine had come on the track until the car moved and the wheel caught

my hand. There are no buildings between the point where the side-track joins the main line and the point where I got hurt. I don't think there were any trees or forest that obstructed the view. This side-track is four or five hundred feet long and is straight from where it leaves the main line."

Jim Wimpey, witness for plaintiff, testified as follows: "The conductor and engineer were both on the opposite side from where plaintiff got hurt; they were on the upper side on the right, and the plaintiff was on the lower side. Most of the men who were working about those cars were on the left side. Just as soon as the train that was coming in on the side-track struck the other car, I heard a man holler—right all in an instant. The other boys, truck-drivers, were waiting for their work to start again and their trucks to be loaded. Earl Orr (the flagman) could have seen part of these men on the lower side, but I don't know whether he could have seen all of them or not."

Bob Mease, witness for plaintiff, testified as follows: "The accident occurred something between 1 and 2 o'clock, fast time. I was standing around the fire when Mr. Wimpey hollered to me. This was the same fire where plaintiff was. He was leaning back against the rail the last time I saw him. His hands were on the rail. He was not back under the car, he was leaning against the rail, under the edge of the car."

There was evidence sufficient for the jury to find therefrom that defendants were negligent as alleged in the complaint, in that defendants ran an engine from the main line into the side-track on which cars were standing with employees of Howard Construction Company present, in and about said cars, for the purpose of unloading same, without giving warning of the engine's approach by ringing the bell or blowing the whistle—the means usually adopted for giving such warning under these conditions, and that this negligence caused plaintiff's injury. *Ray v. R. R.*, 141 N. C., 84.

There was also evidence from which the jury could find that plaintiff was negligent in that he sat down upon the track, under the edge of an empty car and remained there for as long as five minutes, with knowledge that the car was empty and that defendant would probably bring its engine into the side-track for the purpose of moving said empty car therefrom, in accordance with its daily custom, and that this negligence of plaintiff contributed to his injury. *Watts v. R. R.*, 167 N. C., 345.

Defendants rely upon *Watts v. R. R., supra,* as decisive of their assignment of error based upon an exception to the refusal of their motion for judgment as of nonsuit. Upon plaintiff's appeal to this Court the judgment as of nonsuit was affirmed. Plaintiff in that case "was under the car for his own purposes, on a live track, engaged in the performance of no duty whatever, awake and in full possession of his

faculties, and utterly inattentive to his own safety to the very time of his injury." It was held, in the opinion written by *Hoke, J.*, that a typical case of contributory negligence, concurring with that of defendant, and barring plaintiff's claim for damages, was presented. *Ward v. R. R.*, 167 N. C., 148. The facts which the evidence in the instant case tends to establish, distinguish this case from *Watts v. R. R.* In that case there was no evidence from which the jury could find facts to which the doctrine of the "last clear chance" was applicable. In the present case the evidence tends to show that plaintiff was on the premises of defendant, Southern Railway Company, as a licensee, at least; that the engineer and conductor knew when they ran the engine from the main line into the side-track that employees of Hudson Construction Company were engaged in unloading the cars on the side-track, and were then in and about said cars for that purpose.

It was clearly the duty of the engineer under the circumstances shown by the evidence, not only to give timely warning of the approach of the engine, but also to exercise reasonable care to ascertain the situation of the men in and about the cars in order to avoid injuring them, or any one of them. There is evidence from which the jury could find that by exercising such care, he could have seen plaintiff sitting on the cross-tie under the edge of the car, with his legs projecting about three feet beyond the car, and that he could have seen plaintiff in this situation in ample time to have stopped the engine, and thereby have avoided the injury. The failure of the engineer, or of other employees of defendant to perform this duty was the proximate cause of the injury. The instant case is governed by the law as declared in *Hudson v. R. R.*, 142 N. C., 198, and in *Moore v. R. R.*, 185 N. C., 189, rather than by *Watts v. R. R., supra.*

There was no error in the refusal of the court to allow the motion for judgment as of nonsuit.

Nor was there error in submitting the third issue to the jury. The doctrine of *Davies v. Mann,* 10 M. and W. (Exc.), 545, was approved by this Court in *Gunter v. Wicker,* 85 N. C., 310, and has been since consistently followed and applied, when notwithstanding plaintiff's contributory negligence, the evidence tended to show that defendant could by the exercise of reasonable care have avoided the injury to plaintiff. There was evidence in this case from which the jury could find facts to which the doctrine is applicable. The burden upon the third issue was on plaintiff. *Hudson v. R. R.*, 190 N. C., 116; *Lea v. Utilities Co.*, 178 N. C., 509; *Cox v. R. R.*, 123 N. C., 604. The evidence tending to sustain the affirmative of the issue was properly submitted to the jury under instructions to which there are no exceptions.

The judgment is affirmed. We find

No error.

WILSON-STAMEY GROCERY COMPANY v. J. B. ROSS, JR., AND NATIONAL SURETY COMPANY.

(Filed 25 June, 1927.)

Pleadings—Evidence—Proof—Highways — Roads and Highways — State Highway Commission—Principal and Surety—Materialmen.

Where the surety on a contractor's bond given to the State Highway Commission has expressly obligated itself to pay the materialmen and laborers in the terms of the bond given therefor as required by the statute, the surety's liability extends to groceries furnished the contractor for the supply of the men employed only when such are shown by the evidence to have been necessary under the circumstances of the case, and where the complaint sufficiently alleges the facts tending to show this as a necessity, and there is insufficient evidence to support the allegations, a demurrer to the evidence on the trial will be sustained.

APPEAL by defendant, National Surety Company, from *Parker, J.*, at January Term, 1927, of HENDERSON. Reversed.

Action to recover the sum of $2,701.45, upon an account for merchandise sold and delivered by plaintiff to defendant, J. B. Ross, Jr.

At the time of the purchase of said merchandise defendant, Ross, was engaged in the performance of a contract with the State Highway Commission for the improvement of a certain section of highway known as State Highway Project No. 835, and located in Henderson County. Prior to the purchase of said merchandise said defendant had executed and filed with the State Highway Commission a bond as required by said Commission, with defendant, National Surety Company, as surety. One of the conditions of said bond is that defendant, Ross, as contractor, "shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway, all and every sum or sums of money due him, them or any of them, for all such labor and material for which the contractor is liable."

Said bond is dated 1 June, 1923. Defendant began work under his contract with the State Highway Commission during the month of June, 1923, and continued said work until 20 August, 1924. The merchandise was sold and delivered by plaintiff to said defendant from 21 May, 1924, to 18 July, 1924.

In its complaint filed in this action plaintiff alleges: "3. That in order to carry out said contract or project it was necessary for defendant, J. B. Ross, Jr., to erect and operate a commissary and to supply same with groceries and to provide board, in order to properly feed the hands working on said project, and to retain their services. The camp of said contractor was necessarily located several miles from any store. The plaintiff furnished to said J. B. Ross, Jr., groceries aggregating

$2,701.45, which were necessary to and wholly consumed in the prosecution of the work provided for in the contract and bond. The groceries were used in feeding the hands employed on said work and none others, being given to the hands at actual cost and deducted from their wages. The items of tobacco, cigarettes and candy included in the grocery account were given to the hands and deducted from their wages, it being necessary to allot to the hands tobacco, candy, etc., and to feed them in order to keep them in camp and on the job, so the plaintiff is informed and believes and so alleges."

Defendant, National Surety Company, in its answer to the complaint, denies this allegation.

Plaintiff further alleges in its complaint:

"8. That the defendants, by reason of the matters and things herein alleged, are due and owing the plaintiff the sum of $2,701.45, with interest thereon at 6 per cent per annum from 8 August, 1924; that demand has been made upon defendants for the payment of said amount, and that said defendants have failed and refused to pay same."

Defendant, National Surety Company, in its answer, denied this allegation; it alleges that plaintiff never presented its claim in writing or any part thereof to it prior to the institution of this action; it denies, however, liability under the terms of the bond upon which it is surety, for the merchandise sold and delivered by plaintiff to defendant, J. B. Ross, Jr., the principal in said bond.

The issues submitted to the jury were answered as follows:

"1. In what amount, if any, is the plaintiff entitled to recover of the defendant, J. B. Ross, Jr.? Answer: $2,701.45, with interest from 18 August, 1924.

"2. In what amount, if any, is the plaintiff entitled to recover of the defendant, National Surety Company, as surety? Answer: $2,500, with interest from 18 August, 1924."

From judgment upon the verdict defendant, National Surety Company, appealed to the Supreme Court.

Quinn, Hamrick & Harris and Shipman & Justice for plaintiff.
Mark W. Brown for defendant.

CONNOR, J. Upon its appeal to this Court defendant, National Surety Company, relies chiefly upon its assignment of error based upon its exception to the refusal of the trial court to allow its motion for judgment as of nonsuit, at the close of the evidence offered by plaintiff. No evidence was offered by either of the defendants.

Plaintiff seeks to recover in this action of defendant, National Surety Company, for the merchandise sold and delivered by it to the defendant,

J. B. Ross, Jr., by reason of its liability as surety on the bond executed and filed with the State Highway Commission. This it cannot do, unless the evidence offered at the trial is sufficient to sustain the allegations of the complaint. The material allegations of the complaint, as affecting the surety on the bond, are set out in paragraph 3. These allegations are denied by defendant.

In *Plyler v. Elliott,* 191 N. C., 54, there was evidence tending to sustain allegations identical with those of the complaint in this action. A new trial was ordered in that case, because of error in the instruction of the court to the jury, that if they found the facts to be as testified by the witnesses they should answer the issue involving the liability of the surety on a bond identical with the bond upon which defendant in this action is surety, "No." *Plyler v. Elliott* has been approved in *Trust Co. v. Porter,* 191 N. C., 672, in *Chappell v. Surety Co.,* 191 N. C., 703, in *Overman v. Casualty Co.,* 193 N. C., 86, and in *Wiseman v. Lacy,* 193 N. C., 751. In these cases it is held by this Court, following in that respect *Brogan v. Nat. Surety Co.,* 246 U. S., 257, 62 L. Ed., 703, L. R. A., 1918D, 776, that the basis of the liability of the surety on a contractor's bond, conditioned as the bond in the instant case, for materials furnished or labor performed in and about the construction of the road, which is the subject-matter of the contract, for the performance of which the bond is given, is necessity—that is, that the articles furnished were necessary for the performance by the contractor, the principal in the bond, of his contract with the obligee. Significance was also given in the decisions in these cases to the fact that the articles sold and delivered to the contractor, and alleged to be material furnished, within the meaning of the condition of the bond, were consumed, wholly and exclusively, in and about the construction of the highway.

In *Overman v. Casualty Co., supra,* the surety was held liable to plaintiff for hay, grain, and foodstuffs furnished by plaintiff to the contractor, and consumed by the horses and mules employed by him in performing his contract; for oil and grease furnished by plaintiff to the contractor and used and consumed in the construction of the highway; and, also, for groceries and provisions furnished by plaintiff to the contractor and used and consumed by his employees while engaged in the work of constructing the highway; all of these articles were held to be materials furnished in and about the construction of the highway, because the jury found from sufficient evidence that they were necessaries, and because the jury also found from such evidence that they were furnished for and consumed in the performance of the contract. It was held that defendant in that case was not liable as surety on the bond for candies, cigars, cigarettes, tobacco, ginger-ale and soft drinks, fur-

nished by plaintiff to the contractor, because, upon the evidence, in that case, the jury found that they were not necessary for the performance of the contract.

However, in *Gravel Co. v. Casualty Co.*, 191 N. C., 313, it is held that where plaintiff, under a valid contract, furnished to a contractor material reasonably fit and suitable for the performance of his contract, and such material was necessary for that purpose, the fact that the contractor did not use said material for the purpose for which it was furnished, did not relieve the surety upon the bond containing the same condition as the bond in this case, from liability for the payment of the contract price for the material. The rule would seem to be that where material, reasonably fit and ordinarily required for the performance of the contract, is sold and delivered to the contractor in good faith, to be used and consumed in the work which he has contracted to perform, the surety on the contractor's bond is liable for the contract price of the material, where the bond contains a provision substantially identical with that contained in the bond in this case, notwithstanding that the contractor does not use or consume the material, wholly and exclusively, in the performance of his contract. The furnisher of the material is not required to show that the contractor actually used it, in the performance of his contract, in order to establish liability of the surety on the contractor's bond, for the payment of the sum due by the contractor for the material.

In the instant case the evidence does not show or tend to show that it was necessary for the contractor to erect and operate a commissary and to supply same with groceries in order to secure laborers for the work which he had contracted to do, or to retain them in his service. The testimony of B. D. Wilson, president and general manager of plaintiff, tends to show only that groceries and other merchandise sold by plaintiff to defendant, J. B. Ross, Jr., and constituting a part of the stock of goods kept by him in his commissary, for sale to his employees and others, were sold to and consumed by some of the laborers engaged in work on the highway. The testimony of J. B. Ross, Jr., who testified as a witness for plaintiff, tends to show that he was engaged in the performance of his contract with the State Highway Commission from June, 1923, to August, 1924—in all about fourteen months; that during this time he maintained a commissary or store for only eight or nine months; that this commissary was located about midway of the project, which was approximately seven miles in length; that there was a store at each end of the project, which was accessible to his employees; that these stores carried in stock about the same class of merchandise that he kept in his commissary and that his employees, while at work on the project, bought goods at these stores as well as at his commissary.

The commissary was established and maintained for the convenience of all concerned; goods were sold from the commissary, not only to employees of defendant Ross, but also to others, who wished to buy there.

This witness testified also that during the progress of the work on the highway, he maintained a boarding house or mess-hall for such of his employees as desired to get their meals there. He used some of the groceries and provisions purchased by him from plaintiff in this boarding house or mess-hall. He did not board all of his employees—some boarded with him, and some elsewhere.

He testified as follows: "Any of those men who wanted to buy goods there, went and bought them there; they paid cash, if they had cash to pay, and we charged some of them for goods they bought there. As far as the mess-hall was concerned, some of the men boarded there and some did not. Some would buy their supplies at the commissary and carry them to their homes or wherever they stayed and use them there."

The facts alleged in the complaint are sufficient to constitute a cause of action upon which plaintiff was entitled to recover of defendant, National Surety Company, in this action; the evidence, however, is not sufficient to sustain these allegations. There was no evidence from which the jury could find that the groceries and merchandise sold to defendant Ross, by plaintiff, were material furnished in and about the construction of the highway, for which defendant, National Surety Company, were liable under the terms of the bond.

There was error in refusing to allow the motion of defendant, National Surety Company, at the close of all the evidence, for judgment as of nonsuit. The action against this defendant should have been dismissed.

The judgment rendered upon the verdict that plaintiff recover of defendant, National Surety Company, the sum of $2,500, is set aside and the action as against this defendant is dismissed.

Reversed.

S. I. BLOMBERG v. HOBART EVANS.

(Filed 25 June, 1927.)

Landlord and Tenant—Ejection—Partial Eviction—Reduction of Rent—Burden of Proof—Evidence.

In order for the defendant, in summary action of ejectment, to retain possession for partial eviction of the leased premises by paying relatively a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paramount in title, and upon failure of evidence of this character, his claim therefor is properly denied as a matter of law.

APPEAL by defendant from judgment of *Schenck, J.*, at November Term, 1926, of BUNCOMBE. No error.

Proceeding for summary ejectment, begun on 15 September, 1926, in the court of a justice of the peace of Buncombe County, and tried upon defendant's appeal from judgment therein rendered to the Superior Court of said county.

From judgment on the verdict defendant appealed to the Supreme Court.

R. R. Williams for plaintiff.
Wells, Blackstock & Taylor for defendant.

CONNOR, J. On 15 September, 1926, and for some time prior thereto, defendant was in possession of a two-story brick building, situate on a lot in the city of Asheville, N. C., as tenant of plaintiff, holding under a written lease, dated 25 February, 1924. Defendant failed to pay the rent stipulated in said lease for the month of July, 1926, and due on the first day of said month. His term under said lease did not expire until 31 December, 1927; it is expressly provided therein, however, that upon defendant's failure or neglect to pay the rent monthly as same shall become due, he shall forfeit all rights under the lease, and plaintiff may enter upon the premises and expel defendant therefrom.

The monthly rental stipulated in the lease is $125. Defendant paid said sum for each month, included in his term under the lease, prior to 1 July, 1926; on said day he sent to plaintiff, by mail, his check for $80, as rent for the month of July, due on said day. Plaintiff declined to accept said check, and thereupon notified defendant that unless he paid the monthly rent stipulated in the lease, to wit, $125, for the month of July, he would institute proceedings for his summary ejectment from the premises. Defendant refused to pay said sum, and also refused to surrender possession to plaintiff.

This proceeding was begun on 15 September, 1926, in the court of a justice of the peace of Buncombe County. Judgment was therein rendered that plaintiff recover of defendant possession of the premises described in the lease, and also the sum of $125, as rent for the month of July, 1926, and his costs. C. S., 2365, *et seq.* Upon defendant's appeal from this judgment to the Superior Court of Buncombe County, there was a verdict in accordance with plaintiff's contentions. From judgment on this verdict defendant appealed to this Court.

In defense of plaintiff's recovery in this proceeding, defendant alleges that during the month of June, 1926, he was partially evicted from the premises which he held under the lease, as tenant of plaintiff; he contends that he is entitled to an abatement of the rent due for the month

of July, and for each subsequent month included in his term, because of such partial eviction. He contends further that having tendered plaintiff his check in payment of the full amount which he should be required to pay as rent for the months of July, August and September, after such abatement, he was entitled to possession of the premises under his lease, and that, therefore, plaintiff is not entitled to recover in this proceeding.

Upon his appeal to this Court, defendant assigns as error the refusal of the trial court to submit issues tendered by him, in accordance with his allegation, and also the instructions of said court to the jury, upon the issues submitted, for that said instructions denied him the right, as he contends, to have the jury consider and pass upon the matters involved in his defense.

There was no conflict in the evidence. All the evidence, which consisted of the testimony of plaintiff and defendant, each testifying as a witness in his own behalf, tended to show the facts to be as follows:

The subject-matter of the lease as described therein is "a certain lot, with building thereon, in the city of Asheville, Buncombe County, North Carolina, situate on the west side of and known as No. 11 Southside Avenue, together with all the privileges and appurtenances thereunto belonging or in any wise appertaining."

The lot is at the intersection of Southside Avenue and Church Street; it has a frontage of approximately 55 feet on Southside Avenue and a general depth of about 85 feet. It is triangular in shape, and very narrow at the back, running to a point. At the date of the lease, when defendant entered into possession of the lot and building thereon, there was a mountain, or high hill, lying to the north of the lot, known as "The Buxton Hill Property." An alleyway 20 or 25 feet wide had been constructed along the side of the mountain, immediately to the north of the lot. There was no evidence tending to show by whom the alleyway was constructed, or whether or not it was a public alleyway or street.

The building on this lot fronted on Southside Avenue, and covered almost the entire lot. It was a two-story brick building, and was constructed originally and leased by defendant as a garage or repair shop for automobiles. A bridge or ramp had been constructed from the alleyway on the north side of the lot to the second story of the building. This bridge or ramp was used for running automobiles from the alleyway into the second story of the building. No other means was provided for that purpose. Without the bridge or ramp, the second story could not be used as a garage or automobile repair shop, the purpose for which defendant leased the building.

In June, 1926, the owners of "The Buxton Hill Property" cut down and excavated the mountain lying to the north of the lot. The alleyway was graded down by them so that it was no longer on a level with the second story of the building. As a result of this work, the bridge or ramp was destroyed, leaving no means of using the second story of the building for the purpose for which the building was constructed, and leased by defendant. Plaintiff had nothing to do with the excavation of the mountain side, the grading down of the alleyway, or the destruction of the ramp. Plaintiff, when requested by defendant to put an elevator in the building, so that the second story might continue to be used as a garage, declined to do so. He offered, however, to release defendant from payment of rent under his lease, provided defendant would surrender the possession of the premises. This defendant declined to do.

There was no evidence that the destruction of the ramp on the demised property was sanctioned or authorized by plaintiff, or that the owners of said Buxton Hill property had any paramount title to the demised premises or any part thereof, or that said work was done under authority of the city of Asheville, in the exercise of its right of eminent domain.

In the absence of evidence tending to show that the change in the conditions of the demised premises, subsequent to the date of the lease, and defendant's entry thereunder, depriving defendant as lessee of the use, occupation and enjoyment of a substantial part thereof, was caused by plaintiff as lessor, or by some one who had paramount title thereto, there was no error in holding that defendant was not evicted from said premises or from any part thereof, and that defendant could not, therefore, invoke the law as declared in *Poston v. Jones,* 37 N. C., 350, in support of his contention that he was entitled to an abatement of his monthly rental.

"Eviction" is defined as "anything of a grave and permanent character done by the landlord or those acting under his authority with the intention and effect of depriving the tenant of the use, occupation and enjoyment of the demised premises, or any substantial part thereof, or the establishment or assertion against the tenant of a title paramount to that of the landlord." 36 C. J., 255, sec. 979. "An eviction of the tenant by a wrongdoer or trespasser without title, not acting under authority from the landlord does not affect the continuing liability of the tenant to his landlord for rent." 36 C. J., 313 and cases cited in N65.

In *Poston v. Jones, supra,* it is said: "In every lease of land the lessor is so far bound, by implication for the title and enjoyment by the lessee that his right to the rent is dependent thereon; and if the tenant be evicted from the demised premises the rent is thereby suspended. So if the lessee be evicted from a part of the land demised, by a stranger

on title paramount, it operates as a suspension of the rent *pro tanto,* and the rent is apportioned and payable only in respect of the residue."

In the instant case there is no evidence from which the jury could find that defendant was *evicted* from the premises or from a substantial part thereof, by plaintiff, or by any one whose title was paramount to the title of plaintiff; nor is there evidence that the excavation of the "Buxton Hill Property" or the grading down of the alleyway, or the destruction of the bridge or ramp was done by the "Buxton Hill" people under authority of the city of Asheville.

Plaintiff offered to release defendant from payment of rent under his lease, provided defendant would surrender the possession of the property. Defendant insisted upon retaining possession under his lease. There was no error in holding that upon all the evidence he was not entitled to an abatement of his rent because of a partial eviction. The judgment is affirmed.

No error.

P. H. ANDERSON v. CITY OF ASHEVILLE.

(Filed 25 June, 1927.)

Constitutional Law—Taxation—Statutes—Municipal Corporations—Cities and Towns—Zoning Districts—Discrimination in Ad Valorem Tax.

An act authorizing the division of a city into several zones for the purpose of fixing an *ad valorem* basis of real estate for taxation, uniform within each zone, but classified in accordance with density of population, character of buildings, etc., violates the mandatory provisions of our Constitution that within its corporate limits all taxable property shall be by a uniform rule and *ad valorem.* Const., Art. V, sec. 3; Art. VII, sec. 9.

APPEAL by defendant from *McElroy, J.,* heard at chambers by consent, 7 May, 1927, from BUNCOMBE.

Civil action to enjoin the defendant from making any expenditures under an act of the Legislature of 1927, looking to the zoning of the city of Asheville by a commission appointed for that purpose, and to the establishment of different tax rates within said districts or zones.

The trial court was of the opinion, and so held, that the following provision of the act is in violation of the uniformity clause of the Constitution, and therefore void:

"It shall be the duty of said commission to divide the territory embraced within the boundaries of said city, as proposed by said commission, into three distinct zones, on the basis of the comparative density

of population, or existing city improvements, and of the reasonable outlook for the progressive development of the different areas, to the end that there may be an equitable graduation of *ad valorem* municipal taxation as between said several zones.

"The first or inner zone shall include the areas of said city which presently enjoy substantially full municipal benefits and advantages, and the full rate of *ad valorem* municipal taxation shall apply uniformly throughout said zone; the second or middle zone shall include all the territory of said city intervening between the inner and the outer zones, as hereinbefore and hereinafter defined, and one-half of the full rate of *ad valorem* municipal taxation shall apply uniformly throughout said zone; the third or outer zone shall be so laid out as to include all areas that are chiefly valuable for factory sites and related uses, and said zone shall also include all those areas which presently exhibit more of a rural than a suburban aspect, and one-fourth of the full rate of *ad valorem* municipal taxation shall apply uniformly throughout said zone. Continuity of territory shall not be deemed an indispensable requirement in the layout of either of said zones. Except as herein otherwise provided in respect of *ad valorem* municipal taxation, all the provisions of the charter of said city, and all lawful ordinances thereof, shall have equal application throughout the entire territory of said city."

It is conceded that if the above provision be unconstitutional, the judgment should be affirmed. The constitutionality of this provision is the determinative question raised by the appeal.

No counsel appearing for plaintiff.
J. W. Haynes and Frank Carter for defendant.

STACY, C. J. The appeal presents the single question as to whether the gradation of *ad valorem* municipal taxes by zones, as contemplated by the act in question, violates the constitutional requirement of uniformity in taxation. We think it does.

The pertinent provisions of the Constitution are as follows:

"Art. V, sec. 3. *Taxation shall be by uniform rule and ad valorem: exemptions.* Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money," etc.

"Art. VII, sec. 9. *Taxes to be ad valorem.* All taxes levied by any county, city, town, or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution."

Construing these sections in *Redmond v. Comrs.,* 106 N. C., 122, it was held that when the taxing power is exercised for a public purpose, by any county, city, town or township, the taxes so levied "shall be uniform and *ad valorem* upon all property in the same," except property exempt by the Constitution; and by force of these provisions it was said, *all* property within the taxing territory is required to be taxed according to the principles of uniformity and equality pervading the fundamental law. After an exhaustive review of the subject, *Shepherd, J.,* speaking for the Court, said: "After this lengthy discussion, made necessary by the doubt and obscurity into which the subject has fallen, and sustained, as we are, by the general intention of the Constitution as interpreted by the repeated decisions of this Court and other weighty authorities, we conclude that, although the power of a municipal corporation to tax is not conferred by the Constitution, yet, when such a power is exercised, the Constitution 'steps in,' and, without regard to the provisions of its charter, *commands* that *all* property therein, real and personal, including moneys, credits, etc., shall be taxed, and that it shall be taxed according to 'its true value in money,' and by a uniform rule."

This decision would seem to be in full support of his Honor's ruling, and we think it is controlling here. It has been followed in a number of later cases.

Speaking to the meaning of the expression "taxing by a uniform rule," *Bartley, C. J.,* delivering the opinion of the Court in *Exchange Bank of Columbus v. Hines,* 3 Ohio St. Reports, 1, said: "Taxing by a uniform rule requires uniformity, not only in the *rate* of taxation, but also uniformity in the *mode* of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform over all the State; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution, does not stop here. It must be extended to *all property* subject to taxation, so that all property may be taxed alike, equally, which is taxing by a uniform rule."

And in *Knowlton v. Supervisors of Rock County,* 9 Wis., 410, *Dixon, C. J.,* speaking to a question identical in principle with the one here presented, said: "It was contended in argument that as those provisions fixed one uniform rate without the recorded plats and another within them, thus taxing all the property without alike, and all within alike, they do not infringe the Constitution. In other words, that, for the

purpose of taxation, the Legislature have the right arbitrarily to divide up and classify the property of the citizens, and having done so, they do not violate the constitutional rule of uniformity, provided all the property within a given class is rated alike.

"The answer to this argument is, that it creates different *rules* of taxation to the number of which there is no limit, except that fixed by legislative discretion, whilst the Constitution establishes but one fixed, unbending, uniform rule upon the subject. It is believed that if the Legislature can by classification thus arbitrarily and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without, a recorded plat, they can also, by the same means, discriminate between lands used for one purpose and those used for another, such as lands used for growing wheat and those used for growing corn, or any other crop; meadow lands and pasture lands; cultivated and uncultivated lands; or they can classify by the description, such as odd numbered lots and blocks, and even numbered ones, or odd and even numbered sections. Personal property can be classified by its character, use or description, or as in the present case, by its *location,* and thus the *rules* of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions and locations of real and personal property. We do not see why the system may not be carried further and the classification be made by the character, trade, profession or business of the owners. For certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the Constitution operative only to the extent of prohibiting the Legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the Legislature, 'you shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class and against another, as much as you please, provided you serve all of the favored and unfavored classes alike'; thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere, at least outside of those who are the recipients of its favors. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it."

These excerpts, taken from well-considered opinions in other jurisdictions, dealing with the question here presented, are in full accord with

our own decisions. See, also, 2 Cooley's Constitutional Limitations (8 ed.), p. 1066 *et seq.*, for a valuable discussion of the whole subject with full citation of authorities.

The case of *Jones v. Comrs.*, 143 N. C., 59, strongly relied upon by defendant, as we understand it, is not at variance with our present position.

Holding the same opinion as the trial court, that the act in question violates the constitutional requirement of uniformity in taxation, as interpreted by our former decisions, we are compelled to affirm the judgment.

Affirmed.

STATE v. EDWARD EVANS.

(Filed 25 June, 1927.)

1. Homicide—Evidence—Instructions—Self-Defense — Appeal and Error —Harmless Error.

Where the trial judge has correctly instructed the jury upon the prisoner's right to defend himself upon evidence in his own behalf and *per contra*, tending to show that though he willingly entered into the fight he had committed the act later when suddenly it was made necessary to protect his life or himself from great bodily harm, an isolated expression excepted to will be considered with the connected subject-matter in which it was placed in the charge, and the excerpt, though objectionable in itself, will not be held as reversible.

2. Criminal Law—Involuntary Manslaughter—Instructions—Appeal and Error.

Where the evidence upon a trial for a homicide tends to show that in a fight between the defendant and deceased, willingly entered into by the former, the prisoner intentionally shot the deceased with a gun and killed him, and *per contra* that the deceased had taken the gun away from the prisoner, and while in the deceased's possession it was accidentally discharged by the act of the deceased and killed him, a verdict of involuntary manslaughter will be upheld on appeal, upon the facts of this case, under an instruction to the jury that "involuntary manslaughter is where death results unintentionally from an unlawful act negligently done," and the instruction is otherwise correct.

3. Criminal Law—Negligence—Actions.

Negligence, in order to be criminal, must be of a higher degree than that required to be actionable or sounding in damages in a civil action.

CRIMINAL ACTION, tried before *Cranmer, J.*, at January Term, 1927, of PITT.

The defendant was tried upon a bill of indictment charging him with the murder of Leland Stancill. The jury found the defendant "guilty

of involuntary manslaughter." Upon the verdict the defendant was sentenced by the court to a term of two years in the State's prison, from which judgment the defendant appealed.

The evidence tended to show that the deceased, Leland Stancill, had rented the down-stairs of the residence of the defendant's mother for a period of three years and was living in the house and engaged in cultivating the land; that the deceased "had possession of all the buildings except the upstairs of the house." Upon the premises was a garage, which was just large enough for one car. The deceased owned a Ford touring car, which he had been keeping in this garage. Some time prior to the killing the defendant bought a Chrysler. In June, 1926, the prisoner came to the house and put his Chrysler in the garage. Soon thereafter the deceased came in his car and proceeded to push the defendant's car out of the garage. Thereupon the defendant went out to the garage and put his Chrysler back in the garage before the deceased could place his Ford car therein. The deceased then went off to his father's house and came back to the garage with his brothers, Wilford and Robert, and a neighbor named Ola Briley. When the deceased went for reënforcements the defendant also got in his car and went to a neighbor's house and secured a relative named Don Evans. When the deceased and his brothers returned to the scene of action the defendant went out to the garage and stood with his back to his automobile. Thereupon the deceased, Leland Stancill, alighted from his automobile, took out a shot gun and advanced toward the defendant and said: "I am going to move your car." Whereupon the defendant answered: "You will have to move me first." The evidence for the State tended to show that as Leland Stancill started in the garage the defendant hit him in the mouth, and thereupon the defendant grabbed the gun, got possession of it, pulling the gun away from the deceased and firing the same at the deceased and killing him. Defendant further struck the deceased after he had been shot and had him down on the ground choking him when one of the brothers of the deceased undertook to pull the defendant off the deceased. While engaged in this struggle on the ground, the defendant's half brother, a small boy, fired a rifle into the crowd, killing the brother of the deceased.

The defendant contended that he had as much right to use the garage as the deceased, and that he did not fire the gun, but that deceased struck at him while holding the gun by the barrel and the stock thereof struck a part of the garage, causing the gun to fire.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

F. G. James & Son and Albion Dunn for defendant.

BROGDEN, J. The material exceptions in the case are based upon instructions given by the trial judge to the jury.

Exception No. 13 is to the following instruction: "Also, in self-defense, more force must not be used than necessary under the circumstances, and if excessive force is used the prisoner will be guilty of manslaughter." This is an excerpt from an instruction, which is as follows: "One is permitted, gentlemen of the jury, to fight in self-defense; he might whenever it is necessary for him to do so in order to avoid death or great bodily harm; he may also do so when it is not actually necessary if he believes it to be necessary and he has a reasonable ground for the belief; but whether his ground be reasonable is a matter for the jury and not for the prisoner.

I further instruct you the right of self-defense rests upon the necessity, real or apparent, and cannot be exercised if there be a reasonable opportunity to retreat or avoid the difficulty, but if the assault in which the killing be brought about by violence and the circumstances are such that a retreat would be dangerous, he is not required even to retreat. (Also, in self-defense, more force must not be used than necessary under the circumstances, and if excessive force is used the prisoner will be guilty of manslaughter.)"

This instruction, considered in its entirety and in the setting in which it occurs, contains no reversible error and is supported by many decisions of this Court. *S. v. Goode,* 130 N. C., 651; *S. v. Cox,* 153 N. C., 638; *S. v. Robinson,* 188 N. C., 784.

The fourteenth exception is to the following charge of the court:

"I further instruct you that a person cannot invoke the doctrine of self-defense if he enters a fight willingly, unless and until he abandons the combat and his adversary has notice that he has abandoned the combat."

The defendant complains that this instruction does not take into consideration the fact that in all cases of self-defense a defendant must fight willingly, but no legal guilt is attached unless at the same time he is fighting wrongfully; or, in other words, if he fought willingly but rightfully in his own self-defense, using no excessive force, that he would not be guilty of a crime. In support of this contention the defendant relies upon the cases of *S. v. Baldwin,* 155 N. C., 494, and *S. v. Pollard,* 168 N. C., 116. Both of these cases were distinguished in *S. v. Wentz,* 176 N. C., 745, in which exception was taken to the following instruction: "Or, if you find from the evidence that there was a difficulty between them, and that the prisoner entered into the fight willingly." *Walker, J.,* delivering the opinion of the Court, said: "Before giving the instruction, to which this exception is taken, the court very

fully and clearly charged the jury as to murder, manslaughter, and self-defense, and especially with strict reference to the different aspects of evidence in the case, and its application to the several views presented, and this takes it out of the principle as laid down in *S. v. Baldwin,* 155 N. C., 494, and *S. v. Pollard,* 168 N. C., 116."

Construing the entire charge, we think it sufficiently appears that the expression "if he enters the fight willingly" was used in the sense of entering into the difficulty voluntarily, aggressively, and without legal excuse, and must have been so understood by the jury. *S. v. Harrell,* 107 N. C., 944; *S. v. Crisp,* 170 N. C., 785; *S. v. Baldwin,* 184 N. C., 789.

The seventeenth exception is based upon the following instruction:

"Involuntary manslaughter, gentlemen, is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to a felony, or from a lawful act negligently done." This instruction is almost in the exact language of Wharton's Criminal Law, 11 ed., Vol. I, sec. 426. The first part of the instruction was quoted with approval by *Stacy, C. J.,* in *S. v. Whaley,* 191 N. C., p. 391; but the addition of the words "or from a lawful act negligently done" is not in strict accordance with the rule as recognized and applied in this State. In *S. v. Tankersly,* 172 N. C., 955, *Hoke, J.,* said: "But all of the authorities are agreed that in order to hold one a criminal, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue; quoting with approval the definition given in 1 McLean's Criminal Law, sec. 350, as follows: "A negligence which will render unintentional homicide criminal is such carelessness or recklessness as is incompatible with the proper regard for human life." In *S. v. Whaley, supra,* it is further held: "But the culpable negligence of the defendant, and not an independent, intervening, sole proximate cause, must have produced the death."

The jury returned a verdict of "guilty of involuntary manslaughter." Under the evidence contained in the record, in order to convict, the jury must have found that the defendant was engaged in an unlawful act at the time of the killing. The evidence for the State tended to show that the defendant took the gun from the deceased and shot him. The evidence of the defendant was: "I know he hit me across the shoulder and struck the garage; he must have held the gun by the muzzle, for the stock to hit the face of the garage; this caused the gun to fire. I heard it hit, and immediately the explosion which came as almost one." The theory of the defense was that the defendant did not have his hand upon the gun at the time it fired, but that when the deceased undertook to strike him with the stock of the gun the stock struck the garage, causing

the gun to fire. Hence, the deceased came to his death by his own act and not by any act, negligent or otherwise, of the defendant.

It is apparent, therefore, that the jury accepted the State's theory and version of the killing. For this reason the error in the instruction, we think, is not of such weight as to warrant a new trial.

No error.

CORPORATION COMMISSION OF NORTH CAROLINA v. MERCHANTS BANK AND TRUST COMPANY.

(Filed 25 June, 1927.)

Banks and Banking—Special Deposits—Contracts—Trusts—Liens—Receivers—Depositors—Debtor and Creditor.

Where a bank receives a deposit of a check upon an agreement with the depositor that it was immediately to be checked against in part for the payment of a lien upon land, and the check so deposited has been paid in due course by the bank upon which it was drawn, to deposit to the amount so agreed is a special deposit, and the agreement impresses a trust upon the assets of the bank giving it priority in payment over the general deposits, which may be followed into the receiver's hands, and as to the balance, the ordinary relation of debtor and creditor exists.

APPEAL by Wachovia Bank and Trust Company, receiver of defendant Merchants Bank and Trust Company, from *Oglesby, J.*, at November Term, 1926, of FORSYTH. Modified and affirmed.

Angelo Brothers filed a claim with the receiver of the Merchants Bank and Trust Company, seeking to impress a trust upon the assets in the hands of the receiver, with respect to a claim of $20,000, to the end that they might receive preferential payment therefrom, upon the grounds that (1) by false and fraudulent representations claimants were induced to deposit a check for $20,000 in the bank; (2) at a time when it was insolvent to the knowledge of the officers and directors; (3) the check being deposited for a specific purpose, to wit, to be checked against forthwith to pay a designated note of the depositors amounting to $12,950. The claim was denied by the receiver, and upon appeal of Angelo Brothers was heard before the court below and a jury, the verdict and judgment was for Angelo Brothers decreeing it a "preferred claim and a lien on the assets in the hands of said receiver."

As part purchase price of a tract of land, H. A. Page, Jr., gave claimants, Angelo Brothers, a check for $20,000 on the Raleigh branch of the Wachovia Bank and Trust Company. The land was subject to a lien of $12,950 due the American Bond and Mortgage Company. The

$20,000 check was received by Angelo Brothers upon the agreement that it was to be used in the payment of the $12,950 debt secured by lien on the land, the receipt of the check and payment of the lien debt to be practically simultaneous.

On the afternoon of Friday, 23 April (the bank remaining open on the following Saturday and Monday, but not opening Tuesday), M. A. Angelo saw Thomas Maslin, president of the bank, and told him he had the check for $20,000 and would deposit it next day, explaining the circumstances under which it had come to him, if Maslin would allow Angelo to draw a check against it, and Maslin agreed "that he would." M. A. Angelo further testified, "I told him I would deliver the check of $12,950 to the American Bond and Mortgage Company when I made this deposit. He said it was all right. When I explained to him who the check was drawn by, Mr. Page, that I knew it was good, and this amount was due already for two days, he said he would pay it. I relied upon that."

Next morning, Saturday, 24 April, about 9:15, Angelo Brothers deposited the $20,000 check. About thirty minutes after the deposit was made, M. A. Angelo was advised by the payee of the $12,950 check drawn on the deposit in accordance with the agreement, that the bank had refused to pay it. Angelo called Maslin on the phone to know why the check was not paid, and was told by Maslin that "We can't pay checks on uncollected funds . . . it is against the banking rules." Angelo immediately went to the bank and saw Maslin, with whom he had deposited the $20,000 check, and asked him for the return of the check. Maslin referred him to Brower, treasurer of the bank, where he repeated his demand for the check. Brower refused to give it to him, saying they had already sent it off. The demand for the return of the check was made about one hour after the deposit. The $20,000 check endorsed by Page to Angelo and endorsed by Angelo was marked "Paid 4-24-26, 66-763." The deposit book of the claimants (Angelo Brothers) offered in evidence by claimants showed money on deposit 24 April, 1926, $20,758.37. The check of $20,000 was included in the amount on deposit. The report of the receiver showed $36,033.30 in cash that came into the possession of the receiver from the vaults of the Merchants Bank and Trust Company, and that it also received other assets amounting to $394,860.00.

The defendant introduced evidence to the effect that the check was used by the Merchants Bank as a part of the daily ten o'clock clearance settlement with the Wachovia Bank and Trust Company. The balance on that day being in favor of the Wachovia Bank and Trust Company, and requiring in addition to the use of the $20,000 check and other checks

that the Merchants Bank pay to the Wachovia Bank to complete the settlement approximately $13,200.

The issues material and the answers thereto by the jury, as we view the action, for the consideration of the case, were as follows:

"5. If so, were the assets of said Merchants Bank and Trust Company increased to the extent of twenty thousand dollars as a result thereof? Answer: Yes.

6. If so, were the liabilities of said Merchants Bank and Trust Company increased to any amount, and if so, what amount beyond the liability of twenty thousand dollars by virtue of said deposit? Answer: No.

7. Was said deposit of twenty thousand dollars made upon an agreement between Merchants Bank and Trust Company and M. A. and T. J. Angelo, trading as Angelo Brothers, that the said Angelo Brothers were to check thereon immediately, and pay notes to the American Bond and Mortgage Company in the sum of $12,950 as alleged by said Angelo Brothers? Answer: Yes.

8. If so, did Angelo Brothers, in accordance with the agreement, give their check to the American Bond and Mortgage Company in the sum of $12,950 drawn on the Merchants Bank and Trust Company to pay the said notes as alleged by Angelo Brothers? Answer: Yes.

9. If so, did the said Merchants Bank and Trust Company wrongfully breach said contract and refuse to honor and pay said check drawn by Angelo Brothers to the American Bond and Mortgage Company to pay said notes in the sum of $12,950, as alleged by Angelo Brothers? Answer: Yes."

Exceptions and assignments of error were duly made by Wachovia Bank and Trust Company, and appeal to Supreme Court.

Parrish & Deal for Angelo Brothers.

Manly, Hendren & Womble for Wachovia Bank and Trust Company, Receivers.

CLARKSON, J. In *Hawes v. Blackwell,* 107 N. C., at p. 199-200, it is said: "When a bank, in the course of its business, receives deposits of money in the absence of any agreement to the contrary, the money deposited with it at once becomes that of the bank, part of its general funds, and can be used by it for any purpose, just as it uses, or may use, its monies otherwise acquired. The depositor, when, and as soon as he so makes a deposit, becomes a creditor of the bank, and the latter becomes his debtor for the amount of money deposited, agreeing to discharge the debt so created by honoring and paying the checks or orders the depositor may, from time to time, draw upon it, when presented, not exceeding the amount deposited. The relation of the bank and de-

positor is simply that of debtor and creditor, the debt to be discharged punctually, in the way just indicated. The contract between them, whether express or implied, is legal in its nature, and there is no element or quality in it different from the same in ordinary agreements or promises, founded upon a valuable consideration to pay a sum of money, specified or implied, to another party. There are none of the elements of a trust in it. The bank does not assume or become a fiduciary as to the money deposited for the depositor, nor does it agree to hold a like sum in trust for him. *Boyden v. Bank,* 65 N. C., 13; *Bank v. Millard,* 10 Wall., 152; *Bank v. Schuler,* 120 U. S. R., 511."

In *Corporation Commission v. Trust Co.,* 193 N. C., p. 696, the authorities are cited and the rule laid down (1) as to general deposits, (2) special deposits, (3) as to deposits for a specific purpose. As to the last rule, the opinion, at p. 699, quotes from *Morton v. Woolery* (48 N. D., 1132), 24 L. R. A., 1107: "Where money is deposited for a special purpose, as, for instance, in this case, where it was deposited for the stated purpose of meeting certain checks to be thereafter drawn against such deposit, the deposit does not become a general one, but the bank, upon accepting the deposit, becomes bound by the conditions imposed, and, if it fails to apply the money at all, or misapplies it, it can be recovered as trust deposit," citing numerous authorities.

In the *Hawes case, supra,* it says: *"When a bank, in the course of its business, receives deposits of money in the absence of any agreement to the contrary."*

In the *Morton case* when the money is deposited and accepted by the bank for a stated purpose to meet certain checks, to be drawn against the deposit, if the condition imposed is not complied with, and if the bank fails to apply or misapplies, a recovery can be had as a trust deposit.

Brushing aside the cobwebs, in this action the $20,000 Page check was deposited upon the distinct agreement and understanding that Angelo Brothers were to check out $12,950 to pay off the lien. In fact the $20,000 check was part purchase price of land that there was a lien for $12,950 on. The $20,000 deposit was made and a check immediately given to pay off the lien of the $12,950.

The $20,000 deposit was impressed with the trust to the extent of $12,950. The specific purpose was to pay out of it the $12,950, under the facts and circumstances of this action, equity will hold the $12,950 for the benefit of Angelo Brothers. The check was held in trust by the bank for this specific purpose. The balance, it would seem, under the facts disclosed, was a general deposit. There is no question as to the bank collecting the check as it was marked "paid" the very day of the

deposit. In a court of equity the general rule is "Equality is equity," but not so, as in this action, the check of $20,000 was impressed with a trust of $12,950. This amount has priority of payment out of "the assets in the hands of said receiver." As to the balance of the $20,000 deposit, Angelo Brothers is a creditor like any other unsecured creditor.

In accordance with this opinion, the judgment below is

Modified and affirmed.

LEE OWENBY v. POWER COMPANY.

(Filed 25 June, 1927.)

Negligence—Evidence—Nonsuit—Master and Servant—Employer and Employee—Safe Place to Work.

Evidence tending to show that plaintiff was defendant's workman in the construction of a building when snow was on the ground, and while engaged in the scope of his employment was injured by his foot slipping upon the ice and snow tracked into the building by the workmen therein, causing plaintiff to drop a heavy plank he was lifting upon his foot and injuring it: *Held*, insufficient to take the case to the jury upon the defendant's actionable negligence, and defendant's motion as of nonsuit thereon should have been sustained.

APPEAL by defendant from *Stack, J.*, at January Term, 1927, of CHEROKEE. Reversed.

The plaintiff alleged that on or about 14 March, 1926, the defendant was constructing a large warehouse and that certain timbers and waste material had accumulated on the floor of the building; that on the day of his injury the plaintiff was directed by the foreman of defendant to move said timbers; that on the day of his injury there was snow upon the ground, and that snow had been tracked into the building where the timbers were by the workmen engaged upon the building. Plaintiff alleged: "That plaintiff lifted one of said pieces of timber, a green pine board about 2 x 8, and about 16 feet long, and very heavy, when the plaintiff's right foot slipped upon said ice and snow and plaintiff fell with said heavy piece of timber, falling upon and across the plaintiff's left foot and seriously mashing and crushing plaintiff's said left foot."

Issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury, and answered in favor of plaintiff.

The jury awarded as damages the sum of $1,500. From the judgment upon the verdict the defendant appealed.

Moody & Moody for plaintiff.

R. L. Phillips for defendant.

BROGDEN, J. The plaintiff's narrative of his injury is as follows: "There was snow and ice on the floor. The foreman told me to come down and take this timber out into the other end of the house, and I came down and undertook to take the timber out into the other end of the house, and my foot slipped when I picked the timber up. The timber was so heavy when I got up with it my foot slipped on under me. I dropped it on my foot. . . . No one was helping me. There was snow and ice on the floor, almost all over it—that is ice. The building had a roof on it, but the snow was about eight inches on the outside, and this snow was carried in by traffic back and forth on the timber and tracked in there. It had frozen after it was carried in. The foreman was right by me when he told me to remove the timber. He was in plain view of the floor. . . . There was no place to stand to lift this timber except on the ice and snow. . . . The snow and ice was carried in by men coming in and out and on the timbers. . . . Timber was carried in all along during the work. In the traffic you would carry in snow on the feet; you couldn't help it. A certain amount of snow would stay on the timber. . . . I could see the condition of the floor when I came down to remove those timbers just as well as the other men who told me to move them."

The foregoing recital contains substantially all the evidence in the case except evidence as to the extent of plaintiff's injury. From this testimony the determinative question is, whether or not there was any evidence of negligence to be submitted to the jury, viewing the testimony with that broad liberality which the law requires upon motions of nonsuit.

It will be observed that there was no defect in the floor itself, and that the injury to plaintiff, according to his testimony, was caused and brought about by the fact that his foot slipped after he picked up the plank. The work itself was very simple, consisting solely in picking up plank in one part of the building and moving it to another. The only evidence of negligence, therefore, consists in the fact that there was snow upon the ground, and that the workmen in going in and out the building, carried snow on their feet, and that this snow caused plaintiff's foot to slip.

In *Warwick v. Ginning Co.*, 153 N. C., 262, this Court said: "We have repeatedly held that while an employer of labor is required to provide for his employees a reasonably safe place to work, this rule does not apply to ordinary every-day conditions, requiring no special care, preparation or provision, where the defects are readily observable, and where there is no good reason to suppose the injury complained of would result." Also in *Brown v. Scofields Co.*, 174 N. C., 4, *Brown, J.*,

speaking for the Court, said: "The place where plaintiff was standing when hurt was not a *'place'* within the legal signification of that term. It was a condition liable to change at any moment whenever the prosecution of the work required plaintiff to change his position. The defendant's foreman could not possibly be aware of such changing conditions unless he was personally present all the time and exercising that vigilance for plaintiff which the law required him to exercise for himself. . . . If the drastic rule contended for by the plaintiff is held to be good law, it would be almost impossible to construct an ordinary house without constituting the owner or builder an insurer of his employees against those ordinary accidents that are incident to such work."

It is apparent, we think, that the presence of the snow and ice upon the floor was an incident of the progress of the work. Plaintiff testified that the workmen could not help carrying the snow in the building on their feet. The fact that workmen brought snow in on their feet was a common every day condition, and the plaintiff, under the conditions existing at the time, was as capable of ascertaining the danger and of protecting himself against mishap as the foreman or employer. This case differs in principle from that line of cases in which a permanent place of work becomes unsafe by reason of oil or grease, or shavings or obstructions negligently permitted by the employer to accumulate, or where the employer has failed to erect railings or take adequate precaution to guard dangerous places.

In its final analysis, the plaintiff picked up a piece of plank and his foot slipped upon the snow tracked into the building by workmen, and he dropped the plank upon his foot, causing injury. In the words of *Howell v. R. R.*, 153 N. C., 184: "In operations of this character such accidents are not uncommon and are difficult to guard against."

We therefore hold that the motion for nonsuit should have been sustained.

Reversed.

TOWN OF WAYNESVILLE v. FRANK SMATHERS.

(Filed 25 June, 1927.)

Removal of Causes—Federal Courts—Municipal Corporations—Cities and Towns—Condemnation of Lands—Actions at Law—Court's Jurisdiction.

Proceedings by the commissioners of an incorporated town to take the property of a nonresident respondent for a public use are administrative and not judicial until the amount of compensation has been awarded, and the cause regularly transferred to the trial docket upon the respondent's

exception to the amount of damages so assessed, and upon a proper petition and bond of the respondent for the removal of the cause to the Federal Court for the appropriate district, filed in apt time before the clerk, without any act amounting to a waiver of his right, showing his nonresidence, the diversity of citizenship and his claim that the amount of his damages comes within the jurisdictional amount required by the Federal Removal Statute, the cause is accordingly properly removed.

APPEAL by plaintiff from order of *Harding, J.,* at September Term, 1926, of HAYWOOD, allowing defendant's motion for removal of this proceeding from said court to the District Court of the United States for the Western District of North Carolina. Affirmed.

This is a proceeding for the condemnation of land owned by defendant, and situate within the corporate limits of the town of Waynesville, Haywood County, North Carolina, for street improvements. The jury appointed by the board of aldermen of said town, in accordance with provisions of its charter, to assess damages to be paid by plaintiff to defendant, resulting from the taking of his land, filed its report with said board on 2 September, 1926. In said report, defendant's damages were assessed at $500. In apt time defendant excepted to said report, on the ground that his damages should have been assessed at not less than $5,900. He appealed to the Superior Court of Haywood County, as authorized by statute. The next term of said court at which the appeal could be heard began on 20 September, 1926.

In response to defendant's notice of appeal, a transcript of the record in the proceedings was docketed in the office of the clerk of the Superior Court of said county on 11 September, 1926. On 14 September, 1926, defendant filed his petition before the clerk of said court for the removal of the proceeding to the District Court of the United States for the Western District of North Carolina. In said petition he alleges that he is a nonresident of the State of North Carolina, and that the amount involved in the suit, exclusive of interest and costs, exceeds the sum of $3,000. The bond required by statute accompanied the petition. The clerk of the Superior Court heard defendant's motion, in accordance with his petition and allowed same.

Upon plaintiff's appeal from the order of the clerk, the judge presiding at the September Term, 1926, affirmed the order of the clerk and directed that the cause be removed in accordance with the prayer of the petition. From the order of the judge plaintiff appealed to the Supreme Court.

Morgan & Ward for plaintiff.
Alley & Alley for defendant.

CONNOR, J. Prior to the docketing of this proceeding in the Superior Court of Haywood County, upon defendant's appeal from the report of the jury, assessing the amount which defendant was entitled to receive as compensation for his land, and as damages for the taking of the same by plaintiff, for street improvements, under the right of eminent domain, conferred upon plaintiff by statute, it was an administrative, and not a judicial proceeding. Upon such docketing, it became a judicial proceeding, or "suit of a civil nature" within the meaning of U. S. Comp. Stat., sec. 1010, Jud. Code, sec. 28, as amended. It involves a controversy between a citizen of the State of North Carolina, in which the suit was brought, and a citizen of another State; the amount involved exceeds the sum or value of $3,000, exclusive of interest and costs. It was, therefore, removable from the Superior Court of Haywood County to the District Court of the United States for the Western District of North Carolina, provided the petition and bond were filed in apt time as required by act of Congress. It is so held in *Comrs. of Road Imp. Dist. No. 2 v. St. Louis S. W. R. Co.,* 257 U. S., 547, 66 L. Ed., 364.

Chief Justice Taft, in his opinion in that case, after reviewing the provisions of the statute, under which the proceeding was begun, says: "This review shows that the proceedings for the making of this road improvement are, in the main, legislative and administrative. There is, however, one step in them that fulfils the definition of a judicial inquiry if made by a court. That is the determination of the issue between the road district, on the one part, and the landowners on the other, as to the respective benefits which the improvement confers on their lands, and the damages they each suffer from rights of way taken and other injury."

"A judicial proceeding to take land by eminent domain, and ascertain compensation therefor, is a suit at common law within the meaning of the Federal Judiciary Act; and when the requisite diversity of citizenship exists, such suit may be brought in or transferred to the Federal District Court of the district in which the land lies. Such diversity of citizenship arises when a private or municipal corporation seeks to condemn land within the State of its origin, when such land belongs to a citizen of another State; and whether condemnation be effected by judicial proceedings or other statutory processes, the Federal Court must necessarily follow the procedure prescribed by the State statutes." 10 R. C. L., 207, sec. 177, and cases cited.

Immediately upon the docketing of this proceeding in the Superior Court of Haywood County, at which time the proceeding first became a "suit of a civil nature," removable from the State to the Federal Court, defendant filed his petition and bond, as required by act of Congress.

No answer or other pleading was required of him by statute or rule of court to raise the issue to be tried at the next term of the court. He had not waived his right to a removal by filing exceptions to the report of the jury appointed by the board of aldermen to assess his damages; the filing of these exceptions was required by the statute in order to have the proceedings transferred to the Superior Court. The petition for removal, filed before the convening of the court at which the issue between plaintiff and defendant stood for trial, was filed in apt time. He had not theretofore subjected himself or his cause to the jurisdiction of the State court by filing an answer or other pleading. In *Comrs. of Road Imp. Dist. No. 2 v. St. Louis S. W. R. Co., supra,* it is held that where the petition for removal was filed before the day set for the hearing and determination of the issue, the requisites of the removal statute were fulfilled.

The order of removal in the instant case, upon the authority of *Comrs. of Road Imp. Dist. No. 2 v. St. Louis S. W. R. Co., supra,* is Affirmed.

PARKS-BELK COMPANY v. CITY OF CONCORD AND THE BOARD OF LIGHT AND WATER COMMISSIONERS OF THE CITY OF CONCORD.

(Filed 25 June, 1927.)

Government—Negligence—Cities and Towns—Water System.

Where a city maintains a water system as a part of its municipal government for the use of its inhabitants, charging them water rates, it is not liable in damages caused by its negligence to one of them in the bursting of a water main and the flooding of a cellar in his store, wherein he kept merchandise, and under the facts in this case: *Held,* as to defendant's actionable negligence, the evidence was insufficient to be submitted to the jury.

APPEAL by plaintiff from *Oglesby, J.,* at January Term, 1927, of CABARRUS. Affirmed.

Action to recover damages for injury to merchandise stored in the basement of plaintiff's building in the city of Concord, caused by water which flowed into said basement from a water main located under and along a street in said city. The water main was constructed and maintained by defendants as part of the municipal waterworks system of the city of Concord, and was used by defendants both for furnishing water for fire protection and sanitary purposes, and for distributing water for industrial, commercial and domestic use. Consumers of water dis-

tributed through said main for the latter purposes are required to pay, and do pay, to defendants the rates charged in accordance with the schedule promulgated by the city of Concord through the board of light and water commissioners of said city.

Plaintiff alleges that an employee of defendants, after having flushed the street, for the purpose of cleansing the same, by use of a hydrant attached to said main, carelessly, negligently and suddenly cut off and stopped the flow of water from said hydrant, thereby causing the water flowing through the main to burst same, and to flow out upon the surface of the street, and thence into the basement of plaintiff's building located on said street.

Plaintiff further alleges that notwithstanding defendants discovered and were notified within a few minutes after the bursting of said main, that water was flowing therefrom into plaintiff's basement, defendants negligently failed and neglected to cut the water off from said main, and thus stop its flow over the surface of the street into said basement.

Defendants deny these allegations, and also deny liability for the act of its employee, upon the ground that said act was done in its behalf in the exercise of its governmental duties.

At the close of plaintiff's evidence, defendants moved for judgment as of nonsuit. The motion was allowed. From judgment dismissing the action plaintiffs appealed to the Supreme Court.

E. T. Cansler, Palmer & Blackwelder, H. S. Williams and Armfield, Sherrin & Barnhardt for plaintiff.

Hartsell & Hartsell, J. L. Crowell and J. L. Crowell, Jr., for defendants.

CONNOR, J. In *Price v. Trustees,* 172 N. C., 84, it is said: "It is the general rule in this jurisdiction that a municipal corporation when engaged in the exercise of powers and in the performance of duties conferred and enjoined upon them for the public benefit, may not be held liable for torts and wrongs of their employees and agents, unless made so by statute. *Snider v. High Point,* 168 N. C., 608; *Harrington v. Greenville,* 159 N. C., 632; *McIlhenny v. Wilmington,* 127 N. C., 146; *Moffit v. Asheville,* 103 N. C., 237; *White v. Comrs.,* 90 N. C., 437.

A limitation upon the general rule is recognized and established in several of the more recent decisions on the subject when the injury complained of amounts to a taking of private property of the citizen, within the meaning of the term 'taking' as understood and defined in administering the rights of eminent domain. See *Donnell v. Greensboro,* 164 N. C., 330; *Hines v. Rocky Mount,* 162 N. C., 409; *Little v. Lenoir,* 151 N. C., 415.

Again it is held that the general rule, as first stated, does not obtain where the corporation, though partaking to some extent of the nature of a municipal agency and exercising such powers, is, in its primary and controlling purpose, a private enterprise, undertaken and organized for purposes of private gain. *Leary v. Comrs.,* 172 N. C., 25; *So. Assembly v. Palmer,* 166 N. C., 75; *Comrs. v. Webb,* 160 N. C., 594."

In *Scales v. Winston-Salem,* 189 N. C., 469, it is said, in the opinion written by *Adams, J.:* "The nonliability of a municipal corporation for injury caused by negligence in the exercise of its governmental functions may be illustrated by cases in which it is held that a city is not liable for a policeman's assault with excessive force, or for the suspension of a town ordinance indirectly resulting in damage to property, or for injury to an employee while in the service of the fire department, or for failure to pass ordinances for the public good, or for the negligent burning of trash and garbage, or for personal injury caused by the negligent operation of a truck by an employee in the service of the sanitary department of a city." See cases cited in the opinion.

Upon all the facts which the evidence tends to establish, the act of defendant's employee which plaintiff alleges was negligence, was done by him in behalf of defendants, in the exercise of governmental power conferred, and in the performance of governmental duties, imposed upon defendants. The general rule of nonliability, as stated in *Price v. Trustees, supra,* is therefore applicable; there is no evidence from which the jury could find facts to which either of the exceptions to said rule, as stated therein, are applicable.

Nor was there evidence, sufficient to be submitted to the jury, tending to show negligence on the part of defendants in failing to cut the water off from the bursted main, and thus stopping its flow into the basement of plaintiff's building. The water main bursted about 12 o'clock at night; the evidence offered by plaintiff shows that employees of defendants were notified of the situation with reasonable promptness and, under the circumstances, within a reasonable time stopped the flow of water and pumped same out of the basement. Upon all the evidence, under the law in this State, as it has been frequently declared by this Court, defendants are not liable in damages for the injury sustained by plaintiff.

There is no error. The judgment dismissing the action is

Affirmed.

BOARD OF COMMISSIONERS OF McDOWELL COUNTY v. HANCHETT BOND COMPANY, A CORPORATION.

(Filed 25 June, 1927.)

Schools—Taxation—Statutes—Counties—Bonds Issued by County in Behalf of School District.

Where a constitutional statute provides for the issuance of bonds for public school purposes of a district therein and a tax upon that district from which the bonds, principal and interest, shall be paid, and no other, and does not expressly name the payer of the bonds, but authorizes and directs the board of county commissioners to issue the bonds, which shall be signed by the chairman, attested by the clerk and impressed with the corporate seal of the county: *Held*, it was the intent of the Legislature, as construed from the act, that the bonds be issued in the name of the county on behalf of the school district without liability on the part of the county, but to be paid only as the act expressly provides, out of the money received from the tax imposed for the purpose on the poll and property of the designated school district.

APPEAL by defendant from *Oglesby, J.*, in a controversy without action. C. S., 626.

Cross Mill District New No. 4, known as Cross Mill District, is a local tax district in Marion Township, McDowell County. The district has no union school. At the session of 1927 the General Assembly passed an act (S. B. 616, H. B. 959) entitled, "An act to authorize the board of commissioners of McDowell County to issue bonds for school purposes in and for Clinchfield Mill District and Cross Mill District in McDowell County." The act authorizes and directs the board of commissioners to issue $30,000 in coupon bonds, in denominations of $1,000 each, bearing interest from date at a rate not to exceed 6 per cent, for the purpose of acquiring and purchasing a site, and erecting and equipping a school building in Cross Mill District. It also provides that the board of commissioners shall annually levy on the taxable property and polls of the district a sufficient tax to pay the interest on the bonds and to create a sinking fund for the payment of the principal; that the bonds shall be payable exclusively out of the tax so levied and collected; and that authority to issue the bonds shall not be restricted by any debt limit or by the existence or nonexistence of a union school in the district. As a condition precedent to the issuance of the bonds an election was held and the bonds were duly authorized after all the formalities and preliminary matters had been strictly complied with. The only question is whether the plaintiff has the right to issue the bonds in the name of the county. Judge Oglesby was of opinion that the plaintiff has such right, and gave judgment accordingly. The defendant excepted and appealed.

Pless, Winborne, Pless & Proctor for plaintiff.
Hudgins, Watson & Washburn for defendant.

ADAMS, J. After the qualified voters of the district had approved the issuance of the bonds the board of commissioners judicially determined the result and resolved that the bonds should be known as the "Cross Mill District School Building Bonds," should be issued in the name of the county, and should be payable exclusively out of taxes to be levied on the polls and the taxable property of the district. The bonds were awarded to the defendant as the highest bidder, but were refused by it on the ground that they could not legally be issued in the name of McDowell County. Whether they can be issued in the name of the county is the only question for decision.

The special act authorizes and directs the board of county commissioners to issue bonds which shall be signed by the chairman of the board, attested by the clerk, and impressed with the corporate seal of the county, but it contains no express provision as to the name of the promissor. The bonds and the coupons are to be issued "for and on account of" the district; but the corporate seal of the county and the signature of the chairman and of the clerk, which are prerequisite to the validity of the bonds, seem to indicate the legislative intent to have the bonds issued in the name of the county. There is no provision that they shall be issued in the name of the district; and in the absence of specific authority conferred by the Legislature the district has no power either to issue bonds or to levy taxes. *Brown v. Comrs.,* 173 N. C., 598. This principle is in accord with the legislative policy previously adopted in reference to issuing bonds for special school taxing districts or local tax districts within which a union school is maintained. If authorized by a majority of the qualified voters, the bonds of such districts shall be issued by the board of county commissioners in the name of the county, and shall be payable out of taxes to be levied in the district. 3 C. S., 5669, 5670. These sections were not applicable to the election held in the Cross Mill District because within the district no union school was maintained; but the legislative mandate that bonds of the designated districts should be issued in the name of the county is at least persuasive in the case under consideration. A county, moreover, is a body politic and corporate whose powers are exercised by the board of commissioners; and the board's exercise of statutory powers is in contemplation of law the exercise of such powers by the county. The Code, sec. 704; Revisal, sec. 1310; C. S., sec. 1290; *Fountain v. Pitt,* 171 N. C., 113; *S. v. Jennette,* 190 N. C., 96. Why should the bonds not be issued in the name of the county "for and on account of the district," as the special act provides? Each bond must bear upon its face the purpose

for which it is issued and must designate the taxes out of which it is to be paid. While the taxes are to be levied on property and polls within the district the bonds, instead of being issued in the name of the district, may be issued for its benefit and on its behalf in the name of the county. This does not signify that the indebtedness shall thereby become that of the county. In *Comrs. v. State Treasurer,* 174 N. C., 141, the Court said: "It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution, Art. I, sec. 17, which forbids that any person shall be disseized of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land."

Our conclusion finds support in *Brown v. Comrs., supra,* and in *McLeod v. Comrs.,* 148 N. C., 77. See, also, *Jones v. Comrs.,* 107 N. C., 248; *McCracken v. R. R.,* 168 N. C., 62; *Casey v. Dare Co., ibid.,* 285.

The judgment of the Superior Court is

Affirmed.

E. H. WALLER ET AL. v. C. A. DUDLEY, JR.

(Filed 25 June, 1927.)

1. Reference—Boundaries—Dividing Line—Statutes.

A compulsory reference may be ordered by the trial judge in an action involving the true location of a dividing line between the owners of adjoining lands, in an action of trespass, and the wrongful cutting of timber, where the location of the line is complicated or requires a personal view of the premises. C. S., 573 (3).

2. Trespass—Boundaries—Dividing Lines—Parties.

In an action for trespass upon the plaintiff's lands and damages for the unlawful cutting and removing of timber trees, etc., growing upon the lands in dispute involving the question of the true dividing line between the adjoining lands of the parties, the question as to defendant's like trespass upon other lands and damges to the owners does not arise, and it is not error for the trial judge to refuse to make other parties to the action, or exclude evidence of their boundaries.

APPEAL by defendant from *Devin, J.,* at November Term, 1926, of LENOIR.

Civil action in trespass to recover damages for an alleged wrongful cutting of plaintiff's timber.

A question of boundary being involved, the cause was referred under the statute to Hon. D. M. Clark, who heard the evidence, found the facts and made his report to the court. In said report the dividing line between the lands of the plaintiffs and the defendant was established and the plaintiffs awarded $796 as damages for the wrongful cutting of their timber by the defendant. On exceptions duly filed and demand for a jury trial, the following issues were submitted to the jury:

"1. Did the defendant trespass upon the lands of plaintiffs and cut and remove therefrom cord wood and timber trees as alleged? Answer: Yes.

"2. If so, what damages, if any, are plaintiffs entitled to recover? Answer: $450."

From a judgment on the verdict in favor of plaintiffs, the defendant appeals, assigning errors.

Rouse & Rouse and Sutton & Greene for plaintiffs.
Shaw & Jones for defendant.

STACY, C. J. The first exception imputes error to the trial court in ordering a reference in this case. The exception is without merit. C. S., 573, provides for a compulsory reference, "3. Where the case involves a complicated question of boundary, or one which requires a personal view of the premises." *Kelly v. Lumber Co.*, 157 N. C., 175. See, also, *Burroughs v. Umstead,* 193 N. C., 842.

The defendant next complains at the action of the trial court in refusing "to make those persons who own property adjoining the mill-pond parties to this action." So far as appears from the record, no error seems to have been committed in this ruling. Simply because other lands, like those belonging to the plaintiffs and the defendant, border on the mill-pond, is no reason why the owners of such other lands should be made parties to an action involving the right to cut timber trees along the dividing line between plaintiffs' and defendant's lands. They may or may not have had some reason to prefer that the defendant win this suit, but they apparently have no legal interest in the subject-matter of the controversy.

Likewise, the ruling of the trial court in excluding evidence tending to show the boundaries of such other lands along the mill-pond is without significance on the present record.

The remaining exceptions, which have not been abandoned, are equally untenable and cannot be sustained. See 193 N. C., at pages 354 and 749 for two opinions written in this same case dealing with questions of procedure on appeal.

No error.

COLE BROOKS, ADMINISTRATOR OF ROY BROOKS, v. SUNCREST LUMBER COMPANY.

(Filed 25 June, 1927.)

1. Employer and Employee—Master and Servant — Negligence — Railroads—Logging Roads—Comparative Negligence—Damages.

A logging road comes within the provisions of C. S., 3467, and where an employee thereof, in the scope of his duties, is injured by its negligence, the doctrine of comparative negligence applies, and contributory negligence by the employee will not bar a recovery in an action by his administrator to recover for his wrongful death.

2. Actions—Wrongful Death—Nonsuit—Removal of Causes — Courts—Jurisdiction—Limitation of Actions.

C. S., 160, requiring that to maintain an action for damages for a wrongful death it must be brought in a year, construed with C. S., 415, extends the time within which the action must be brought in case of nonsuit to the extreme limit of two years, and where the defendant has, under the Federal statutes, removed the cause from the State to the Federal Court, and there taken a nonsuit, and has commenced his action again in the State court, the fact that the second action between the same parties, upon the same subject-matter, was commenced in the State court more than one year after the date of the death does not bar the plaintiff's right of action.

3. Master and Servant—Employer and Employee — Negligence — Comparative Negligence—Verdict—Damages—Appeal and Error.

Where the plaintiff's complaint demands damages in a certain amount in his action involving the issues of negligence and contributory negligence, and the application of the rule of comparative negligence under the provisions of C. S., 3467, the fact that the jury has rendered a verdict for damages to the full amount demanded in the complaint under a proper instruction does not alone show that the jury had failed to follow the rule of damages prescribed in such instances, and the verdict will not on that ground be disturbed on appeal.

APPEAL by defendant from *Harwood, J.*, at November Term, 1926, of MACON. No error.

Action to recover damages for the wrongful death of plaintiff's intestate, who at the time he sustained the injuries which caused his death, was an employee of defendant, a corporation engaged in the operation of a logging road in Haywood County, N. C.

The issues submitted to the jury were answered as follows:

1. Was plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did plaintiff's intestate by his own negligence contribute to his death, as alleged in the answer? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover? Answer: $3,000.

4. Is the plaintiff's cause of action barred by the statute of limitations, as alleged in the answer? Answer: No.

From judgment on the verdict defendant appealed to the Supreme Court.

Horn & Patton, and Bourne, Parker & Jones for plaintiff.
P. C. Smith, A. Hall Johnston and Alley & Alley for defendant.

CONNOR, J. There was evidence at the trial of this action sufficient to sustain affirmative answers to both the first and second issues submitted to the jury. Defendant, a corporation organized under the laws of the State of Delaware, owns and operates within this State a logging road. Plaintiff's intestate was employed by defendant as a brakeman on a train operated by defendant on this road. At the time he sustained his fatal injuries, caused by the negligence of defendant, as the evidence tends to show, and as the jury found as appears by the answer to the first issue, plaintiff's intestate was engaged in the performance of his duties as an employee of defendant. His contributory negligence, therefore, does not bar a recovery by plaintiff, his administrator in this action. C. S., 160, 3467, 3470. There was no error in the refusal of the court to allow the motions of defendant for judgment as of nonsuit, made first at the close of the evidence introduced by plaintiff, and again at the close of all the evidence. C. S., 567. Assignments of error based upon exceptions to the refusal to allow these motions are not sustained.

Plaintiff's intestate died on 20 November, 1923. This action was begun 8 September, 1925, more than one year from the date of his death. C. S., 160. It was agreed, however, at the trial, that an action based upon the same cause of action as that set out in the complaint herein, was begun by the plaintiff against the defendant in the Superior Court of Macon County, N. C., on 3 March, 1924; that is, within one year from the date of his death. The complaint in said action was filed on 12 March, 1924. On 31 March, 1924, upon petition of defendant, that action was removed from the Superior Court of Macon County to the District Court of the United States for the Western District of North Carolina for trial, under the provisions of the act of Congress. An answer was filed by defendant in the District Court on 3 May, 1924, and a reply thereto by plaintiff on 26 May, 1924. The action thereafter pended in the District Court until 3 August, 1925, on which day plaintiff took a voluntary nonsuit. This action was thereupon begun in the Superior Court of Macon County within less than a year after

the date of the nonsuit in the United States District Court. Defendant excepted to the instruction of the court that if the jury believed the evidence pertinent to the fourth issue, they would answer said issue, "No."

Defendant's assignment of error based upon this exception cannot be sustained. It has been held by this Court that C. S., 415, providing that if the plaintiff is nonsuited in an action commenced within the time prescribed therefor, he may commence a new action within one year after such nonsuit, is applicable to an action for wrongful death under C. S., 160, which provides that such action must be brought within one year after the death. *Trull v. R. R.,* 151 N. C., 545. It has also been held that where an action has been removed from the State court to the Federal Court, under the act of Congress providing for such removal, and a voluntary nonsuit is taken by plaintiff in the action while same is pending in the Federal Court, he may bring a new action upon the same cause of action in the State court within one year from the date of such nonsuit, by reason of the provisions of C. S., 415. *Fleming v. R. R.,* 128 N. C., 80. This case is cited in the Case Note to *Young v. Southern Bell T. & T. Co.,* 75 S. C., 326, 55 S. E., 765, 7 L. R. A. (N. S.), 501. In that case it is held that the removal of a suit from a State to a Federal Court does not confer upon the latter such exclusive jurisdiction that upon its entering an order of discontinuance, plaintiff cannot institute a new action upon the same cause in the State court, laying the damages so low as to prevent a second removal. In the note to the opinion in that case, as reported in 7 L. R. A. (N. S.), 501, it is said: "With the exception of one decision, and a few *dicta,* the cases are unanimous in favor of the doctrine of *Young v. Southern Bell T. & T. Co.,* that the removal to the Federal Court of an action commenced in a State court does not, in the event the action is dismissed in the Federal Court, without a decision on the merits, upon the plaintiff's motion or upon his voluntary submission to a nonsuit, prevent him from commencing and maintaining a new action upon the same cause of action in the State court." See cases cited in support of this statement of the law.

This Court has held, however, that C. S., 415, is not applicable to an action brought in a State court under the Federal Employers' Liability Act, *King v. R. R.,* 176 N. C., 301; *Belch v. R. R.,* 176 N. C., 22. In the opinion in the latter case, *Hoke, J.,* says: "We are not inadvertent to several decisions of our own Court which hold that this provision (Rev., 370, now C. S., 514) allowing a new action to be brought within twelve months after nonsuit, applies to all cases of nonsuit, including actions for wrongfully causing the death of another, required by our statute to be brought within one year after the death (Rev., 59,

now C. S., 160), and held with us to be a statutory condition of liability. *Gulledge v. R. R.*, 148 N. C., 567; *Meekins v. R. R.*, 131 N. C., 1. But while this is the recognized position as to suits governed by the laws of this jurisdiction, it may not be allowed to prevail when a Federal statute conferring the right of action has fixed upon two years as the time within which the action should be brought, without any modification by reason of the pending of a former suit; and our highest Court, as stated, construing the law, has held that the statute itself affords the exclusive and controlling rule of liability in all cases coming under its provisions." This action was brought under the laws of this State and not under the Federal statute; the rights of the parties must therefore be determined, not by the Federal statute, but by the laws of this State. See *King v. R. R., supra.* Defendant's road and its operation of the same is exclusively intrastate.

The evidence pertinent to the third issue involving the amount which plaintiff is entitled to recover in this action, as damages, tends to show that his intestate at the date of his death was 29 years of age. His previous health had been good. He was employed by defendant as a brakeman and flagman, and was engaged in the performance of his duties at the time he was injured. Plaintiff, who is his father, testified that he did not know what his wages were, but that he thought he was earning about $3.50 per day. These are the only facts which the evidence tends to show pertinent to this issue. In his complaint plaintiff alleges that by reason of the wrongful acts of defendant he suffered great damage in the sum of $3,000.

C. S., 3467, which is applicable to this action, is in words as follows: "In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." See, also, C. S., 3470.

In his charge the court instructed the jury fully and correctly in accordance with the statute. There is no exception in the case on appeal to these instructions. The following statement, however, appears therein:

"Upon the coming in of the verdict by the jury in this case, the court asked the jury if it had agreed upon its verdict, and the jury replied that it had. The court then directed the clerk to take the verdict. The clerk took the written verdict and read same in open court. At this point and before the clerk had been ordered to record the verdict, and before the jury had been permitted to separate, counsel for plaintiff an-

nounced to the court that there might be some question as to whether or not the answer to the third issue was proper, and asked that the jury be directed under a charge from the court to take this issue back for reconsideration." Just prior to the coming in of the verdict, the court had adjourned for the noon recess.

Upon motion of plaintiff's counsel, as above set out, the court directed the jury to keep their seats in the box pending his decision.

To the motion above-named, defendant's counsel objected, insisting that the verdict had been received, and when so received, upon the verdict, defendant was entitled to a new trial. The court in its discretion, overruled the motion of plaintiff's counsel and accepted the verdict, and signed the judgment as appears in the record. Defendant excepted and assigns as error the signing of the judgment upon the verdict. Defendant contends that it appears on the face of the verdict, considered in connection with the allegations of the complaint, that the jury did not diminish the damages, assessed by them, in proportion to the negligence of plaintiff's intestate, which they found contributed to his death.

It cannot be held as a matter of law that the jury disregarded the instructions of the court as to the law to be applied by them in determining the amount which plaintiff as administrator of deceased was entitled to recover in this action as damages, in the event they should answer the first and second issues in the affirmative. This amount by reason of the allegations of the complaint was limited to $3,000. The purpose of this limitation is manifest. Plaintiff chose to limit the amount which he demanded as damages to $3,000, rather than demand a larger sum, to which upon his allegation and proof, he may well have thought he was entitled to recover of defendant, a nonresident, who had procured the removal of the former action from the State court to the Federal Court, because plaintiff had demanded in that action a sum in excess of $3,000. The plaintiff was well within his rights in thus limiting the amount for which he demanded damages, for the purpose of preventing the removal of this action, for trial in the Federal Court, doubtless being moved to do so because of the greater expense involved in a trial in that court than in the State court.

It is apparent that the jury found that the full amount of plaintiff's damage, caused by the negligence of defendant, was in excess of $3,000, and, in accordance with the instruction of the court diminished such damages in proportion to the amount of negligence attributable to plaintiff's intestate, which contributed to his death, as determined by them.

The full damages which plaintiff has sustained by the negligence of defendant must, under the statute, be diminished by a sum which bears the same proportion to said damages as the contributory negligence of

plaintiff's intestate bears to the negligence of defendant. *Davis v. R. R.*, 175 N. C., 648, citing *R. R. v. Tilghman*, 237 U. S., 500, 59 L. Ed., 1069. A fair interpretation of the verdict does not require the conclusion that in answering the third issue the jury disregarded the instruction of the court.

There was no error in rendering judgment upon the verdict. Other assignments of error have been considered; they cannot be sustained. The judgment is affirmed.

No error.

JAMES R. PENTUFF v. JOHN A. PARK, O. J. COFFIN AND TIMES PUBLISHING COMPANY.

(Filed 25 June, 1927.)

1. Constitutional Law—Libel—Newspapers—Retraxit—Statutes.

C. S., 2429, 2430, and 2431, providing that a newspaper publishing a libel may avoid, under certain conditions, the payment of punitive damages is not discriminatory, but a constitutional enactment. Const. of North Carolina, Art. I, secs. 20, 35.

2. Same—Actual Damages—Freedom of the Press.

The "actual damages" recoverable in a suit for libelous publication by a newspaper in the event of a retraxit, allowed by the statute, is for pecuniary loss, direct or indirect, or for physical pain and inconvenience, and a recovery therefor does not abridge the freedom of the press, as inhibited by our Constitution, Art. I, sec. 20.

3. Libel—Newspapers—Profession—Minister of the Gospel—Damages—Libelous per se.

A publication by a newspaper of and concerning the plaintiff that he was an "immigrant ignoramus," and towards those who disagreed with him upon the subject of evolution was discourteous, and that he was suppressed on one occasion for his bearing and conduct by the chairman of a legislative committee which was considering legislation involving the question of evolution, etc., affects the calling or profession of the one concerning whom the publication had been made, and if untrue, is libelous and actionable *per se*, without evidence of special damages.

4. Same—Retraxit—Evidence—Questions for Jury—Nonsuit.

Where a newspaper has refused to publish a retraxit for its publication of and concerning a minister of the Gospel, which, if untrue, would be libelous, and publishes its refusal, asserting the truth of its former publication, and contrasting the plaintiff with other well-known ministers of the Gospel in the territory of its circulation, the reassertion of the truth of the former publication and the matter contained in the latter, together with other pertinent circumstances, are proper to be considered by the jury as evidence that the plaintiff, in his action for libel, had been injured in his vocation as a minister of the Gospel, and sufficient to deny defendant's moton as of nonsuit thereon.

5. Same—Pleadings—Justification—Mitigating Circumstances.

In order to show circumstances under which a libel was published, that the jury should consider as mitigating circumstances that would reduce the amount of damages in an action for libel against a newspaper, the defendant must plead the justification or the mitigating circumstances relied on.

APPEAL by plaintiff from *Stack, J.,* at October Term, 1926, of CABARRUS. Reversed.

This is a civil action brought by plaintiff against defendants for libel. The Times Publishing Company, being a corporation and publishing *The Raleigh Times,* John A. Park, the publisher, and O. J. Coffin the editor. Plaintiff alleges that *The Raleigh Times* has a large circulation in the city of Raleigh and surrounding territory, and has some circulation in Cabarrus County. He further alleges:

"2. That the plaintiff is a resident of Concord, Cabarrus County, N. C., and is now the pastor in charge of McGill Street Baptist Church, in the city of Concord; that the plaintiff, instead of being an 'immigrant ignoramus,' as alleged by defendant in the libelous and defamatory article hereinafter complained of, is a native of North Carolina, having been born and reared in Rutherford County, N. C., and lived there till seventeen years of age, and was prepared for college at Mooresboro Academy in Rutherford County; that he is a graduate of Furman University at Greenville, S. C.; a graduate of Southern Baptist Theological Seminary at Louisville, Ky.; that he spent two years in post graduate study at Shurtleff College, at Upper Alton, Ill.; that he spent three years in post graduate study at the University of Chicago, at Chicago, Ill.; that he has the degree of Doctor of Philosophy; that his Alma Mater, Furman University, has conferred on him the honorary degree of Doctor of Divinity; that he has served as educator in the following: as Dean of Burlington Institute, at Burlington, Iowa; Dean of San Marcos Baptist Academy, at San Marcos, Texas; as President of Stephens College, Columbia, Mo. That in addition to his services as an educator he has filled the following pastorates, viz.: Pastor of First Baptist Church, Shelbino, Mo.; First Baptist Church, St. Joseph, Mo.; Pastor First Baptist Church, Gonzales, Texas, and now pastor of McGill Street Baptist Church of Concord, N. C.

"3. That the defendants, on 23 February, 1926, contrivingly and wickedly and maliciously intending to injure the plaintiff in his good name, fame, credit and character, both as an individual and as an educator and as a minister of the Gospel, and to bring him both as an individual and as an educator and as a minister of the Gospel into public ridicule, contempt, disgrace and scandal with and amongst his neighbors, members of his congregation, and members of all the churches of

the Baptist denomination in the city of Raleigh, and the State of North Carolina, and to cause it to be believed and suspected by the citizens of North Carolina, both in the city of Concord and in the city of Raleigh, and elsewhere, and especially by the members of the Baptist denomination in said city of Raleigh and elsewhere in the State of North Carolina that he, the said plaintiff, had been, and was guilty of being as defendants alleged, an 'unmannerly' and 'discourteous' person who had to be 'suppressed,' and that he was 'ignorant' and an 'uncharitable' minister of the Gospel, and withal an 'immigrant ignoramus,' with an implied insinuation that his character was 'unproven,' said defendants to vex, harass, oppress and destroy plaintiff's personal and professional character and reputation, both as a scholar and as a Baptist minister, did falsely and maliciously compose, write and publish in a newspaper called *The Raleigh Times* of and concerning him the said plaintiff, a false, contemptuous, scandalous and defamatory libel hereinafter set forth, viz.:

"'PENTUFF RE-ENTERS EVOLUTION FIGHT.

"'We see by the Sunday morning paper of this city that Fuquay Springs, under the leadership of one Pentuff, of Concord, has declared war against what it is pleased to call evolution.

"'We cannot say that Fuquay Springs does not know its stuff, but we do state without fear of successful contradiction that if it learned about evolution from Pentuff, it might just as well go back to the encyclopedia or some other authority for additional information.

"'For Pentuff, if our memory does not play us false, is the same chap who tried to tell the legislative committee on education all about evolution at the last session of the General Assembly. He was supposed to be shedding light on the Poole resolution and its probable results. Beyond stating categorically that he had been president of a college or two, of which nobody in the audience had ever heard, and that science had disapproved something that he called "evolution," but had evidently never met, he contributed anything to the discussion.

"'He was, indeed, so unmannerly in his approach to the matter before the House, so discourteous to those whom he deemed to be in disagreement with him, that the chairman of the committee, Representative Connor of Wilson, suppressed him.

"'At Fuquay Springs, with none to check his observations or to make him justify his conclusions, we have no doubt that he convinced the more vociferous members of his audience that he knew something about the subject on which he elected to converse.

"'There has not to our knowledge appeared in public within the memory of the present generation of North Carolina a more ignorant

man than Pentuff, or one less charitable towards men who might honestly disagree with him. If Fuquay Springs will insist on taking the word of an immigrant ignoramus against that of men of proven character and intelligence, such as Drs. Vann and Poteat, whom it has known all their lives, we suppose there is nothing that can be done about it.

" 'But it does the intelligence of this Wake County community scant credit.'

"That the false, contemptuous, malicious, defamatory and libelous matter in above article which plaintiff herein alleges to be false, malicious and defamatory is in the following paragraphs, viz.:

"He was, indeed, so unmannerly in his approach to the matter before the House, so discourteous to those to whom he deemed to be in disagreement with him that the chairman of the committee, Representative Connor, of Wilson, suppressed him.

"At Fuquay Springs, with none to check his observations or to make him justify his conclusions, we have no doubt that he convinced the more vociferous members of his audience that he knew something about the subject on which he elected to converse.

"There has not, to our knowledge, appeared in public within the memory of the present generation of North Carolinians, a more ignorant man than Pentuff, or one less charitable towards men who might honestly disagree with him. If Fuquay Springs will insist on taking the word of an immigrant ignoramus against that of men of proven character and intelligence, such as Drs. Vann and Poteat, whom it has known all their lives, we suppose there is nothing that can be done about it.

"But it does the intelligence of the Wake County community scant credit."

"4. That by reason of said publication in said *Raleigh Times,* a newspaper having a large circulation in the city of Raleigh and surrounding counties, and also having a circulation in city of Concord, where plaintiff resides, and by means of committing of several wrongs and grievances by said defendant, the plaintiff has been, and still is, injured in his good name, fame, credit, character and reputation both as an individual and professionally as an educator and as a minister of the Gospel and brought into public ridicule, contempt, disgrace and disrepute with and amongst a large body of citizens to plaintiff unknown, the same being readers of said *Raleigh Times,* and being persons who have read said libelous and defamatory article in said *Raleigh Times* as above set forth, in the following manner, viz.:

"(a) By reason of the allegation that plaintiff was so 'unmannerly' and 'discourteous' before the legislative committee that plaintiff was 'suppressed' by Chairman Connor, the character of plaintiff is injured

both as an individual and as an educator, and as a minister of the Gospel, by leading people to believe that plaintiff is in fact 'unmannerly' and 'discourteous.'

"(b) By reason of the allegation that, 'There has not, to our knowledge, appeared in public within the memory of the present generation a *more ignorant* man than Pentuff, or one less *charitable,* and by reason of the further allegation that, "If Fuquay Springs will insist on taking the word of an *'immigrant ignoramus'* against that of men of *'proven'* character and intelligence such as Drs. Vann and Poteat, we suppose there is nothing that can be done about it,' the character and reputation of plaintiff as a teacher and educator and as a minister of the Gospel is greatly injured, damaged and destroyed in that said plaintiff as an educator and as a minister of the Gospel is largely dependent for his livelihood and living upon his being acceptable as an educator and as a minister of the Gospel, and said defendants have wrongfully, maliciously and by false statements created the belief and impression that plaintiff is 'ignorant' and an 'ignoramus,' and therefore not fit to be chosen either as an educator or as a minister of the Gospel, thereby depriving plaintiff of the possibility of securing employment either as teacher or minister outside the circles where he is already well and favorably known.

"(c) That by reason of said false and malicious and libelous and defamatory publication by defendant, plaintiff has suffered great mental anguish, both personally and in contemplation of the pain and suffering caused to plaintiff's wife on account of said publication by defendant.

"That by reason of the said publication and the said injury to his character and reputation as an educator and as an individual and a minister of the Gospel, and the said mental anguish and suffering as above set forth, the plaintiff has been and is still damaged in the sum of twenty-five thousand dollars.

"5. That plaintiff did five or more days before the commencement of action serve notice in writing on the defendants, specifying the articles and the statements therein which were false, libelous and defamatory, and the defendants have made no retraction or apology therefor." Demand for damages, $25,000.

The answer of defendants admits The Times Publishing Company is a corporation and publishes *The Raleigh Times;* John A. Park is the publisher, and O. J. Coffin the editor. And further:

"2. Answering allegation two of the complaint, these defendants admit that James R. Pentuff, the plaintiff, resides in Concord, North Carolina, and at the time of the filing of the complaint herein was pastor of McGill Street Baptist Church in said city; that the words 'immigrant ignoramus' referred to in said allegation as used in the editorial appear-

ing in *The Raleigh Times* of which plaintiff complains were true, but these defendants expressly deny that they wrote or published any libelous and defamatory article, as alleged; and that as to all other allegations and things contained in said allegation, these defendants have no knowledge or information sufficient to form a belief thereon, and therefore deny the same.

"3. Answering allegation three of the complaint, these defendants expressly deny each and every allegation therein contained, except as to the publication of the editorial from *The Raleigh Times* therein recited, and as to the said editorial these defendants affirm the truth of all statements therein contained.

"4. Allegation four of the complaint is denied.

"5. Answering allegation five of the complaint, these defendants admit that five or more days before the commencement of this action a notice in writing was received through the mail by these defendants, and these defendants further admit that they have made no retraction or apology on account of the editorial complained of.

"Wherefore, having fully answered, these defendants pray that this action be dismissed," etc.

The other necessary facts will be set forth in the opinion.

At the close of plaintiff's evidence the defendants made a motion for judgment as in case of nonsuit, which motion was allowed by the court below. The plaintiff excepted, assigned error, and appealed to the Supreme Court.

Zeb. V. Turlington and Morrison H. Caldwell for plaintiff.
Albert L. Cox and Hartsell & Hartsell for defendants.

CLARKSON, J. On the trial plaintiff introduced evidence to sustain the allegations of the complaint. The defendants introduced no evidence, but on cross-examination of plaintiff brought out facts tending to impeach his credibility as a witness.

C. S., 2429, is as follows: "Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory."

C. S., 2430: "If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in a conspicuous

place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in criminal proceeding, a verdict of 'guilty' is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more."

C. S., 2431: "The two preceding sections shall not apply to anonymous communications and publications."

The above law was passed by the General Assembly of 1901, ch. 557, and is known as the "London Libel Law." It was held constitutional in *Osborn v. Leach,* 135 N. C., at p. 641. *Douglas, J.,* concurring in result, said: "While concurring in the result, I feel constrained to say that in my opinion the so-called 'Libel Act' is unconstitutional, inasmuch as it discriminates between the editor of a newspaper and the ordinary citizen. If I write a letter libeling an editor, that perhaps at most *ten* people may see, and he libels me by printing identical charges against me that *ten thousand* people may see, I am subject to pains and penalties from which he is exempted by operation of the statute. Whatever other merits the act may have, I do not think that such discrimination can be sustained under the explicit provision of our Constitution. It is, however, due to the Court to say that its opinion eliminates from the act its most dangerous features. *Walker, J.,* concurs in result only. *Connor J.,* did not sit on the hearing of this case."

The words "actual damages," in the "London Libel Law," include (1) pecuniary loss, direct or indirect; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; (4) damages for injury to reputation; therefore, it does not abridge the responsibility for the abuse of the freedom of the press and is unconstitutional. The statute was held constitutional, as it forgave *punitive damages* in case of retraction. *Osborn v. Leach, supra;* Connor and Cheshire, Const. of N. C., Anno., p. 95.

Similar acts have been held constitutional and unconstitutional in other states. The decision in the *Osborn case, supra,* is the law of this jurisdiction.

Plaintiff offered in evidence the editorial contained in *The Raleigh Times* of 24 March, 1926, as follows:

"TO SUE OR NOT TO SUE, PENTUFF'S QUESTION

"One J. R. Pentuff of Concord, by profession a preacher and Ph.D., and by practice of recent months somewhat of an agitator presumably in the interest of the faith founded some two millenniums since by a certain Carpenter of Nazareth, has filed against the Times Publishing Company, John A. Park, president, and Oscar J. Coffin, editor, suit for $25,000, alleged libel contained in an editorial of *The Raleigh Times* of 23 February.

"First notice of Mr. Pentuff's intention was received on 4 March by Editor Coffin in a letter addressed to him and John A. Park, president of The Times Publishing Company. This letter we quote exactly as written, allowing for a little variation on the part of a linotype machine, which cannot do everything a typewriter will.

"Mr. Pentuff wrote:

" 'To John A. Park, publisher, O. J. Coffin, editor, and Times Publishing Company, publishers of *The Raleigh Times:*

" 'Take notice that the undersigned intends to bring a civil action against you for damages for the libel upon him by you by reason of your publication in the edition of 23 February, 1926, of *The Raleigh Times,* the following article: The editorial at top of second column headed "Pentuff Reënters Evolution Fight," the following statements in said article being false and defamatory:

" 'There has not to our knowledge appeared in public within the memory of the present generation of North Carolinians a more ignorant man than Pentuff, or one less charitable toward men who might honestly disagree with him. If Fuquay Springs will insist on taking the word of an immigrant ignoramus against that of men of proven character and intelligence, such as Drs. Vann and Poteat, who it has been known all their lives, we suppose there is nothing that can be done about it.

" 'He was, indeed, so unmannerly in his approach to the matter before the house, so discourteous to those whom he deemed to be in disagreement with him that the chairman of the committee, Representative Connor, of Wilson, suppressed him. (Signed) J. R. Pentuff. Concord, N. C., 3 March, 1926.'

"Publisher Park being out of the city, and the editor seeing nothing then as he does now to retract or apologize for, nothing was done about the matter. Perhaps *The Times* outfit had some doubt as to whether a lawyer could be found who would bring a suit on grounds so untenable.

"The author of the alleged libel, for a matter of some eight years editor of this paper, did not at the time of its writing or at the receipt of Mr. Pentuff's letter, and does not now consider his description of Mr. Pentuff as 'an immigrant ignoramus,' or 'unmannerly,' to be actionable. However, that is for the courts, at the demand of Mr. Pentuff, to determine.

"There is nothing to add to what has been said; that is no desire or intention on the part of *The Times* to subtract anything. In our opinion, J. R. Pentuff is ignorant, he is unmannerly in debate, and he is uncharitable in his dealings with good and intelligent men of even his own denomination.

"If that be 'false and defamatory,' let him make the most of it."

The question presented for our consideration: Was the alleged editorial actionable *per se?*

The action of plaintiff is based on the editorial of 23 February, 1926, and not on the editorial of 24 March, 1926.

In the present action the defendants made a motion in the court below for judgment as in case of nonsuit, which the court allowed. We cannot so hold.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

There is no dispute about the publication. It is not a privileged communication, the only question, is it libelous *per se?*

An action for libel may always be brought when the words published expose the plaintiff (1) to contempt, hatred, scorn or ridicule; or (2) are calculated to injure him in his office, profession, calling, or trade.

"Everything printed or written which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been. It is a tort which consists in using language which others, knowing the circumstances, would reasonably think to be defamatory of the person complaining of and injured by it. The words need not necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous. . . . Or which have a tendency to injure him in his office, profession, calling, or trade. . . . And so, too, are all words which hold the plaintiff up to contempt, hatred, scorn, and ridicule, and which, by thus engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society, such as an imputation of scoundrelism." Newell, Slander and Libel (4 ed.), pp. 8, 9. Shirley's Leading Cases on the Common Law, 3d Eng. Ed., p. 335; 25 Cyc., pp. 326, 327, 328, 329; 36 C. J., p. 1180; *Morey v. Morning Journal Asso.,* 123 N. Y., p. 207; *Sidney v. McFadden Newspaper Pub. Co.,* 242 N. Y., 208, 151 N. E. Rep., p. 209; *Gattis v. Kilgo,* 128 N. C., p. 424; *Paul v. Auction Co.,* 181 N. C., p. 1; *Hedgepeth v. Coleman,* 183 N. C., p. 309; *Deese v. Collins,* 191 N. C., p. 749. In *Hall v. Hall,* 179 N. C., at p. 573, it is said: "The defendant fails to note the distinction between oral and written slander, or libel, the latter being actionable if it tends 'to render the party liable to disgrace, ridicule, or contempt, and it need not impute any definite infamous crime. *Simmons v. Morse,* 51 N. C., 7.' *Brown v. Lumber Co.,* 167 N. C., 11."

"Many of the statements testified to by the witnesses, and which the jury must have found were made by the defendant, imputed, not a lack of skill in a particular case, but general ignorance of medical science,

incompetency to treat diseases and a general want of professional skill. Such statements, made in respect to a practicing physician, are slanderous and actionable without proof of special damages." *Cruikshank v. Gordon,* 118 N. Y. Rep., at p. 183.

"To impute duncehood or want of scholarship to a member of either of the learned professions touches his profession. Cook's Law of Defamation, 18; *Peard v. Jones,* Cro. Car., 382. "It is libelous *per se* to publish in a Polish newspaper of a physician largely patronized by Poles, that he is a 'blockhead or fool,' adding, 'Can we entrust ourselves and our families to his care when he so hates them that he would not help a man if he could?' *Krug v. Pitass,* 162 N. Y., 154, 56 N. E., 526, 76 Am. St. Rep., 317." 4 Newell, Slander and Libel (4 ed.), p. 20. Vol. 50, Central Law Journal, p. 362.

"Words touching a clergyman in his profession are actionable *per se.* Words are often actionable when spoken of clergymen which would not be so if spoken of others. But it does not follow that all words which tend to bring a clergyman into disrepute, or which merely impute that he had done something wrong, are actionable without proof of special damage. The reason always assigned for this distinction between clergymen and others is that the charge, if true, would be ground of degradation or deprivation. The imputation, therefore, must be such as, if true, would tend to prove him unfit to continue his calling, and therefore tend more or less directly to proceedings by the proper authorities to silence him." Newell, *supra,* part sec. 144, p. 176. 3 Lawson, Rights, Remedies and Practice, sec. 1255; 25 Cyc., p. 335; *Chaddock v. Briggs,* 13 Mass., 248; 7 Am. Dec., 137; *Remsen v. Bryant,* 56 N. Y. Sup., p. 728.

In Lawson, *supra,* it is said: "Though a charge of immorality, not amounting to an indictable crime, is not actionable *per se,* there is an exception in the case of clergyman or priest. Ministers of the Gospel, being teachers and exemplars of moral and Christian duty, a pure and unspotted moral character is absolutely necessary to their usefulness. . . . His whole life, and not the hours he is engaged in the pulpit, is watched and closely scrutinized. As said in *Chaddock v. Briggs,* 13 Mass., 248, 'He is separated from the world by his public ordination, and carries with him constantly, whether in or out of the pulpit, superior obligations to exhibit in his whole deportment the purity of that religion which he professes to teach.' "

In the *Chaddock case, supra,* it was held actionable *per se* to charge a clergyman with drunkenness.

The language in the following cases was held actionable *per se:* "He preacheth nothing but lies and malice in the pulpit." *Crauden v. Walden,* 3 Lev., 17, 9 Bac. Abr., 48.

"I have always known that he was unfit for the ministry, and an improper person to be allowed to preach, and was too dangerous and indiscreet." *Flanders v. Daley,* 120 Ga., 885, 48 S. E., 327.

To publish of a man that he "is a very miserable fellow; no man in this community would say that it is possible for us to injure him to the extent of six cents; the community could hardly despise him worse than they now do." *Brown v. Remington,* 7 Wis., 462.

To write concerning a man, "I look upon him as a rascal, and have watched him for many years." *Williams v. Karnes,* 4 Humph. (Tenn.), 9.

State that a person had "brainstorms." *Hibbon v. Moyer* (Tex.), 197 S. W., 1117.

A letter written to a third person, calling the plaintiff "a villain." *Bell v. Stone,* 1 B. and P., 331; 126 Eng. Rep., p. 933.

In *Simmons v. Morse,* 51 N. C., at p. 7, it is said: "Hence, to publish, in writing, that a person is a *swindler,* or a *hypocrite,* or an *itchy old toad,* has been held to be libelous."

The analysis of the article: It must be read in the setting. It indicates that theretofore the Rev. James R. Pentuff, pastor in charge of the McGill Street Baptist Church of Concord, N. C., had appeared before the General Assembly—the legislative committee on education. The heading of the editorial speaks of him as *"Pentuff";* again it speaks of him as *"one Pentuff";* again, *"Pentuff";* then again, "For *Pentuff* . . . is the same *chap,"* so *"unmannerly,"* so *"discourteous,"* the chairman had to *"suppress* him." "There has not to our knowledge appeared in public within the memory of the present generation of North Carolinians (1) a more *ignorant* man than *Pentuff;* (2) or one *less charitable* towards men who might honestly disagree with him. If Fuquay Springs will insist on taking the word of an *immigrant ignoramus* against that of men of *proven character* and intelligence, such as," etc. The permissible implication being that he, being an *immigrant ignoramus,* his character needed to be proven. Webster defines "Ignoramus" to mean "An ignorant person, a vain pretender to knowledge, a dunce."

"A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in

evidence, which of the two meanings should be attributed to it by those to whom it is addressed or by whom it may be read." *Commercial Publishing Co. v. Smith,* 149 Fed. Rep., 704, 706, 707. *Peck v. Tribune Co.,* 214 U. S., 185, 190; *Washington Post Co. v. Chaloner,* 250 U. S. Rep., at p. 293.

It is contended by defendants that the editorial of 23 February, 1926, upon which the action is founded: "The language must particularly affect the libelee in his occupation or profession. The editorial herein does not refer to the plaintiff's profession as a minister. The defendants submit that the article did not attack the plaintiff in his professional capacity, and therefore no cause of action was stated on that basis."

Newell, Slander and Libel (4 ed.), pp. 286-287, says: "Also, whenever the words of a libel are ambiguous, or the intention of the writer equivocal, subsequent libels are admissible in evidence to explain the meaning of the first, or to prove the inuendoes, even although such subsequent libels be written after action brought."

The editorial of 24 March, 1926, makes clear any ambiguity in the first article and the unequivocal intention of the writer. The editorial of 23 February, 1926, it may be noted, referred to plaintiff as having been president of a college and compared him with two well-known ministers, one a college president and the other a former college president, of the same denomination, to his discredit. This would indicate that even in the first editorial, defendants were referring to plaintiff in his calling. The subject of the editorial is one discussed by clergymen in their vocation or calling. *Morasse v. Brodin,* 151 Mass., p. 567; *Ohio and M. Ry. Co. v. Press Pub. Co.,* 48 Fed. Rep., p. 206. We think the editorial libelous *per se* on two grounds, that they expose plaintiff (1) to contempt, hatred, scorn or ridicule; (2) calculated to injure him in his vocation or calling as a minister of the Gospel.

Const. of N. C., Art. I, sec. 20: "The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same."

"In its broadest sense, freedom of the press includes not only exemption from censorship, but security against laws, enacted by the legislative department of the Government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muffling public opinion. Black Const. Law, pp. 472, 473; Cooley Const. Lim., pp. 517, 518; Ordinaux Const. Leg., p. 236, *et seq.;* 3 Story Const., p. 731." *Cowan v. Fairbrother,* 118 N. C., at p. 416.

Const. of N. C., Art. I, sec. 35: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

"Section 35, Article I, guarantees that every person shall have through the courts, 'for an injury to his lands, goods, person, or *reputation.*' He is entitled by constitutional right to have such injury determined and the amount of just compensation for his wrong settled by a jury of his peers." *Osborn v. Leach, supra,* at p. 639.

Mr. Justice Sanford, in *Gitlow v. New York,* 268 U. S., at p. 666, says: "It is the fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity, and prevents the punishment of those who abuse this freedom. 2 Story, Const. (5 ed.), sec. 1580, p. 634, and numerous authorities. . . . Reasonably limited, it is said by Story, in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic." *Whitney v. California,* U. S. Sup. Court Advance Opinions, 1 June, 1927, p. 675, 71 Law Ed.

"In *Burris v. Bush,* 170 N. C., p. 395, it is said: 'The statute (Rev., sec. 502, now C. S., 542), permits a defendant in actions for libel or slander to allege "both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and, whether he prove the justification or not, he may give in evidence the mitigating circumstances," but, in the absence of a plea in justification or mitigation, evidence of the truth of the charge is incompetent. *Upchurch v. Robertson,* 127 N. C., 128; *Dickerson v. Dail,* 159 N. C., 541.'" *Elmore v. R. R.,* 189 N. C., at p. 673.

The defendants, in their answer, plead that the editorial of which plaintiff complains was true, under C. S., 542. The editorial, as heretofore stated, was libelous *per se.* The defendants did not avail themselves of the privilege given them under the "London Libel Law"; therefore, the damages that may be awarded would include punitive as well as actual damages.

Mr. Blackstone, in his Commentaries, Book 3, ch. 8, part sec. 125, gives the reason why libel is made indictable and an action at law can be sustained: "A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous light, and thereby diminish his reputation. With regard to libels in general, there are, as in many other cases, two remedies: one by indictment, and the other by action. The former for the *public* offense; *for every libel has a tendency to the breach of the peace, by provoking the person libeled to break it* (italics ours); which offense is the same (in point of law), whether the matter contained be true or false; and therefore the defendant, on an indictment for publish-

ing a libel, is not allowed to allege the truth of it by way of justification. But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant may, as for words *spoken,* justify the truth of the facts, and show that the plaintiff has received no injury at all."

Sanborn, Circuit Judge, in *Times Pub. Co. v. Carlisle,* 94 Fed. Rep., at p. 765, in a libel action, well says: " 'A good name is rather to be chosen than great riches, and loving favor rather than silver and gold.' The respect and esteem of his fellows are among the highest rewards of a well-spent life vouchsafed to man in this existence. The hope of them is the inspiration of his youth, and their possession the solace of his later years. A man of affairs, a business man, who has been seen and known of his fellow-men in the active pursuits of life for many years, and who has developed a good character and an unblemished reputation, has secured a possession more useful and more valuable than lands, or houses, or silver, or gold. Taxation may confiscate his lands, fire may burn his houses, thieves may steal his money, but his good name, his fair reputation, ought to go with him to the end—a ready shield against the attacks of his enemies, and a powerful aid in the competition and strife of daily life."

For the reasons given, the judgment must be

Reversed.

TOWN OF NEWTON, R. P. CALDWELL AND EVERETT LONG, TAXPAYERS OF CATAWBA COUNTY, v. STATE HIGHWAY COMMISSION.

(Filed 25 June, 1927.)

1. Roads and Highways—State Highway Commission—Final Exercise of Discretionary Powers—Relocation—Statutes.

The State Highway Commission is not authorized by statute to make an entire change of route in its system of State Highways between county-seats from one that it has finally adopted. *Carlyle v. Highway Commission,* 193 N. C., 49.

2. Same—Tentative or Temporary Location of a Link in the State's System of Highways.

Where, by its acceptance and taking over of a county public highway, the State Highway Commission has made final its exercise of the discretionary power of locating a highway connecting two county-seats, thereafter the commission may not entirely change this route upon the theory that its location by them was only tentative or temporary, and that they had afterwards ascertained that the other route would be more advantageous from an engineering standpoint.

3. Same—Appeal and Error—Questions of Law—Findings of Fact.

A finding of fact by the trial judge that an entire change of route in a link of highways connecting two county-seats was only temporary, is not binding upon the Supreme Court on appeal when, as a matter of law, upon the evidence, it is conclusively made otherwise to appear.

4. Highways—Roads and Highways—State Highway Commission—Duties of Commission.

Under the statute providing for a State Highway System it is the duty of the State Highway Commission, in the exercise of the discretionary power given it, to select or locate the various roads in each county; to maintain and control the existing highways so selected and adopted "in the most approved manner as outlined in this act," and "relieve the counties and cities and towns of the State of this burden"; to do such work upon the various links of the system "as will lead to ultimate hard-surfaced construction as rapidly as money, labor and material will permit."

5. Same—Principal Towns—Statutes—Protest—Parties.

Where the State Highway Commission has posted its maps at the county-seat of the county to be affected by its adoption of links in a State Highway, should any principal town along this route object thereto, it becomes the duty of such town, under the provisions of the statute, to object or protest the location, if they desire to do so, and upon their failure to exercise this statutory right, they are not proper or necessary parties to the proceedings, and it is not error for the trial court to refuse their motion to be made parties.

6. Same—Appeal and Error—Procedure—Presumptions.

It is presumed on appeal, when the record is silent in relation thereto, that the State Highway Commission properly, and as the statute requires, made publication of the proposed adoption of a link in the State Highway System, by posting the map thereof at the county-seat, etc., as the law requires.

7. Injunctions—Roads and Highways—State Highway Commission.

An injunction will lie against the State Highway Commission from proceedings to make a change in a link of the State System of public highways unauthorized by the statute.

STACY, C. J., and ADAMS, J., concurring in part and dissenting in part.

CIVIL ACTION, before *Harding, J.*, 2 December, 1926.

This was a civil action instituted in the Superior Court of Catawba County, in which the plaintiffs procured a temporary restraining order and injunction restraining and enjoining the defendant from constructing a proposed highway between Statesville and Newton. The plaintiffs also asked for a writ of *mandamus* to compel the defendant to construct a road, which the plaintiffs contend the defendant has heretofore adopted and selected as the road connecting Statesville and Newton. The cause came on for hearing upon the complaint and the map attached thereto, marked Exhibit "A," and the answer and the map attached thereto, and

the affidavit of one G. L. Stine, to the effect that the map referred to in the pleadings, as posted at the courthouse door of Newton, was the map of the roads in Catawba County so posted at the courthouse door by the defendant, and that no objection or protest against the roads indicated thereon have been made by the county commissioners of Catawba County or by the street-governing body of any city or town in said county within sixty days after the posting of said map.

This was all the evidence offered in the case.

The second, third, sixth and seventh findings of fact, together with a portion of the fifth finding, are as follows: (The fifth finding of fact embodies the findings of fact made by Judge Webb in a former case, which will be found in *Newton v. Highway Commission,* 192 N. C., 54.)

2. "That the section of highway between Statesville, N. C., the county-seat of Iredell County, in said State, and Newton, N. C., the county-seat of Catawba County, in said State, after the passage of said act of 1921, was temporarily adopted and taken over as a part of the State Highway System as a portion of Route No. 10, and that thereafter said highway was duly indicated on a map, copy of which is hereto attached, marked Exhibit 'B,' which was posted at the courthouse door in the town of Newton, indicating the adoption of said highway through Catawba County as then constituting a part of the State Highway System, and a link in Route No. 10; that since said temporary adoption of said section of said road by defendant, defendant has maintained the same as a part of said highway system, as a link in Route No. 10, and that said road has been the main thoroughfare between Statesville and Newton for more than twenty years; that the highway, when located and constructed between Statesville and Newton, will be a part of the 5,500 miles of State Highway System provided for in the said act of 1921, as indicated by the said map attached to and constituting a part of said act of 1921."

3. "That defendant has made a careful investigation and study of the relative use, cost, value, importance and necessity of several suggested routes proposed to constitute a link in the State Highway known as 'Route No. 10,' between Statesville and Newton, N. C.; that defendant has adopted and ordered to be constructed a highway between Statesville and Newton, as shown on a map or blue-print hereto attached, marked Exhibit 'A,' which route is indicated by an orange line, marked 'Line No. 3,' and which connects with the towns of Catawba and Claremont on said route, and enters the town of Newton, so as to connect with Route No. 16, the road from Lincolnton to Newton, about one block south of the county courthouse in the said town of Newton; that the route so selected by defendant is an abandonment of the road between Statesville and Newton, which has been in use for practically twenty years, and that said new route so selected and adopted by defendant

abandons the old route, heretofore temporarily adopted, at or about the corporate limits of Statesville, and does not anywhere come in contact with said old route again until it reaches the courthouse square of Newton; that at the time of the commencement of this action, defendant had entered an order by the terms of which it had declared its purpose to abandon the route heretofore adopted as aforesaid, between Statesville and Newton, and was advertising for bids for the construction of said new route; that said new route, instead of passing through the southeastern portion of Catawba County, as Route No. 10, now proceeds, goes north of Route No. 10, as it now proceeds, and practically through the center of the town of Catawba, from where it is proposed to enter the county at the Catawba River and on into Newton, and is removed, in same places, a distance from one to eight miles from Route No. 10, as it now proceeds."

(Portion of 5.) "The location of the southern route on said map abandons the route known as 'Route No. 10,' at a point about half way between the town of Newton and the Catawba River, and proceeds from that point along a comparatively straight line, to the town of Newton, which said southern route is indicated on the map hereto attached as Exhibit 'A,' by a red line, marked 'Line No. 1,' the route temporarily adopted by defendant as a sector of Route No. 10, being indicated by the dotted lines on said blue-print or map, marked 'N. C. No. 10.'

6. "That the route which the defendant proposes to construct, as indicated by the orange lines on the map, Exhibit 'A,' will parallel with another road already passing through the northern part of Catawba County; that the route proposed by defendant will connect with two public roads; that the route now used as a link in Route No. 10, from Newton to Statesville on the southern route, as indicated by the red line on the map, connects with eleven public roads, which represent a thickly settled section of the county, where travel is very heavy; that the proposed route, over which defendant proposes to construct said highway in Catawba County, as indicated by the orange line on the map, Exhibit 'A,' passes through the two flourishing towns of Catawba and Claremont, each having a population of about four hundred, and through a thickly populated rural territory between said towns; that the southern, or present route, does not run near or connect with any town between Newton and the Catawba River in Catawba County; that the eleven roads referred to above as connecting with the present link of Route No. 10, or as the southern route, lead directly or indirectly into Catawba, Claremont and Newton, and will there connect with Route No. 10, if the road is constructed as now proposed by the defendant, as indicated by the orange line on the map, Exhibit 'A.'

7. "That the distance from Statesville to Newton over the southern route proposed by plaintiffs is 5.09 miles greater than over the proposed route of defendant, marked in orange on the blue-print or map, Exhibit 'A,' and designated as 'Line No. 3'; that it will cost $250,000 less to construct defendant's proposed route than it will cost to construct the said present route; that defendant was advised by the Attorney-General's Department that the defendant's said route is in substantial conformity to the route shown on the State Highway map attached to said Highway Act, and defendant in good faith and in the honest exercise of the discretion conferred upon it by said act, and the construction of the same by the Supreme Court of North Carolina, adopted the said proposed route as a part of Route No. 10, from Statesville, N. C., the county-seat of Iredell County, to Newton, N. C., the county-seat of Catawba County."

Before the pleadings were read or evidence offered, the towns of Catawba and Claremont moved the court to be permitted to become parties to the action. The court allowed the motion. Thereupon the plaintiffs moved for a continuance upon the ground that as Catawba and Claremont had been made parties and filed answers, issues were raised which the plaintiffs were unable to meet at the hearing. Thereupon, after hearing argument upon the question, the court came to the conclusion that the towns of Catawba and Claremont had not made a sufficient show of interest to entitle them to be made parties defendant and file answers, and ordered the answers of said towns to be stricken out. Whereupon, Catawba and Claremont appealed.

Clyde R. Hoey, W. A. Self, Wilson Warlick and W. C. Feimster for plaintiffs.

J. H. Burke and Grier & Grier for town of Catawba.

Whitener & Whitener and A. A. Whitener for town of Claremont.

Assistant Attorney-General Ross for State Highway Commission.

BROGDEN, J. In order to understand clearly the point involved in the present controversy, it is perhaps worth while to examine the setting of this case. The plaintiffs in this action instituted a suit against the defendant Highway Commission about April, 1926, alleging that the present road between Statesville and Newton was a part of the 5,500 miles of the State Highway System provided for in the act of 1921, and that this road was shown on the legislative map attached to the act and further, that the road had been mapped by the defendant and taken over as a part of Route No. 10. The defendant, in its answer, admitted that the existing road between Statesville and Newton, as described in the complaint, had been taken over and designated as part of Route No. 10.

In that case the defendant proposed a total abandonment of the existing road which it had designated as a portion of the State Highway System, and to construct an entirely new road along the yellow line from Statesville to Newton, extending north of the right of way of the Southern Railway Company, touching neither Catawba nor Claremont, and entering Newton just within its northern corporate limits, as shown by the Exhibit 'A,' filed in the cause. A hearing upon the matter was held before Judge James L. Webb, who found certain facts and rendered judgment restraining the defendant from constructing said road along said yellow line within Catawba County. The findings of fact and judgment in that case appear in 192 N. C., p. 54. The defendant appealed to the Supreme Court, and the court held that the road proposed by the defendant, represented by the yellow line, was not in compliance with the law for the reasons given in the opinion. After the former decision, the defendant, on or about December, 1926, proposed another road and advertised for bids to construct the same. This proposed road is the subject of the present controversy. The road proposed by the defendant leaves Statesville along the yellow route referred to in the former case. Some distance west of Statesville it turns southwestward to the town of Catawba, and thence bears northwestward south of the right of way of the Southern Railway Company to the town of Claremont, and thence bears again southwestward, entering the town of Newton about a block from the courthouse, and is designated on the map as "Line No. 3." Roughly speaking, the line contended for by the plaintiffs follows in a general way the present road, which was mapped by the defendant and posted at the courthouse door of Catawba County, until it reaches a point some distance west of Catawba, where it leaves the present existing road and continues in practically a straight line to Newton, thus eliminating a loop in the present road. The defendant contends that it has power under the law to entirely abandon the present road and construct a new road along the orange line, or Line No. 3, which may be designated as the northern route.

The plaintiffs contend that the defendant has no power, under the Road Act, to totally abandon the road which was mapped at the courthouse door and taken over as a part or a link of the State Highway System, for the reason that the law empowered the defendant to change or relocate existing roads, and that the road proposed by the defendant is not a change or relocation of the existing road, but a total abandonment thereof, and the construction of a totally new and independent road.

The merit of these contentions is the question presented in this case.

The facts are comparatively simple: On 16 March, 1921, J. C. Carpenter, an engineer, surveyed a road, running from Statesville to

Newton. This was an existing highway, and had been used for more than twenty years. Thereupon the defendant caused a map to be made of said road and posted at the courthouse door in Catawba County. The law required notice to be given. After posting said map, the law required that the county commissioners and street-governing bodies of each city or town "shall be notified of the routes that are to be selected and made a part of the State System of Highways." No protest was filed by the county commissioners of Catawba County or by the street-governing body of any town in said county within the period of sixty days prescribed by the Road Act. The law says: "In that case the said roads or streets, to which no objections are made, *shall be and constitute links or parts of the State Highway System.*" If objections had been made, the defendant, after giving notice, had the power to hear the whole matter. In such event, the law says: "And the decision of the State Highway Commission shall be final." Thereupon, the defendant assumed control of this road and has since maintained it. It gave it a name and called it Route No. 10. So that the defendant, in the exercise of its sound discretion, proposed, designated, surveyed, mapped, selected, and established this existing highway as the sole and independent connecting link between Statesville and Newton.

In *Carlyle v. Highway Commission,* 193 N. C., p. 49, this Court said: "We are therefore of the opinion that the statute means that when an existing highway has been designated, mapped, selected, established and accepted by the State Highway Commission as the sole and independent connection between two county-seats in compliance with the formalities prescribed by the statute, that this is a location of the road as a permanent link of the State System of Highways."

The defendant, however, earnestly contends that this is not a correct interpretation of the Road Act for the reason that the mapping, designation and adoption of the links or sections of highway which it took over and assumed the maintenance of, were only intended as temporary acts, and that such links, under the law, are only temporary links in the State System of Highways.

The trial judge found "that the section of highway between Statesville, N. C., . . . and Newton, after the passage of said act of 1921, was temporarily adopted and taken over as a part of the State Highway System as a portion of Route No. 10, and that thereafter, said highway was duly indicated on a map . . . which was posted at the courthouse door in the town of Newton, indicating the adoption of said highway through Catawba County as constituting a part of the State Highway System, and a link in Route No. 10." The record discloses that all the evidence before the court was the complaint, the answer, the exhibits, and an affidavit. Upon the admitted facts, therefore, the question as to

whether or not the road was adopted temporarily is a question of law, because it is agreed that the defendant designated, surveyed, mapped and posted this highway as required by the statute. Whether the conduct of the defendant amounted to a temporary adoption of the highway in controversy or the permanent adoption thereof depends upon the construction of the law. Did the law contemplate that compliances with the formalities prescribed by the statute were only temporary acts and a mere species of shadow boxing? The Road Act, in defining the purposes thereof, contains this language: "And for the further purpose of permitting the State to assume control of the State Highways, repair, construct, and reconstruct and maintain said highways at the expense of the entire State, *and to relieve the counties and cities and towns of the State of this burden.*" Again, in section 50 the act provides: "The board of county commissioners or other road-governing bodies of the various counties in the State are hereby relieved of all responsibility or liability for the upkeep or maintenance of any of the roads or bridges thereon constituting the State Highway System, *after the same shall have been taken over and the control thereof assumed by the State Highway Commission, etc.*" This provision of the law, we apprehend, was enacted for the reason that all automobile license taxes and gasoline taxes which the counties would use for road purposes had been turned over to the defendant. It was therefore just and proper that, after the defendant received these vast revenues from the counties and cities and towns, it ought to bear the burden of maintaining such existing roads in the counties as were incorporated into the State System of Highways, and to "repair, construct and reconstruct" them. How can the county of Catawba be relieved of liability for the maintenance of this existing highway if the defendant is permitted to totally abandon it and cast the maintenance thereof back upon the county? The defendant admits in its answer that it has spent large sums of money for the maintenance of this highway since its adoption as a part of the State System.

Again, section 8 of the Road Act required the defendant, within 60 days, to commence *"to assume control of the various links of road constituting the State Highway System, . . .* and complete the assumption of control . . . as rapidly as practicable." If the contention of the defendant is correct, then the language "various links of road constituting the State Highway System" is meaningless, because there would be no links constituting the State Highway System until such time as the defendant should establish such links.

Again, in section 9, the act provides: *"After the selection of a part or parts of the State Highway System,* the Commission may cause roads comprising such system . . . to be distinctly marked, etc." If the contention of the defendant is correct, then this clause of the law would

be meaningless, because no selection of a part or parts of the State Highway System has ever been made.

Again, in section 9, subsection (c), the act provides: *"After taking over section or sections of the State Highway System,* the Commission may erect proper and uniform signs, etc." If the contention of the defendant is correct, then this clause of the law would be meaningless for the reason that no section or sections of State Highway System existed or would exist until such time as the defendant in its discretion should create and establish such sections.

Reduced to a minimum, the contention of the defendant is that the act contemplated two highway systems, one a temporary system, which it took over and assumed control of, and the other a permanent system, which it would thereafter, in the exercise of its discretion, ordain, lay out, establish, and construct. We are of the opinion that the plain provisions of the statute indicate that when an existing highway was mapped by the defendant and selected and incorporated as a part of the State System in accordance with the formalities prescribed, that these highways, so selected and incorporated, became permanent links of the State System.

Now, conceding that when it has mapped an existing highway and assumed control of it that it becomes a permanent link in the State System, the defendant contends that it has the power under the road law to change, discontinue, abandon, and relocate such road in such way and manner and to such extent as it may choose. We assume that it will be readily granted that the source of the defendant's power and discretion is the act itself. What does the Act say in regard to these matters? In section 7 it is provided: "A map showing the proposed roads to constitute the State Highway System is hereto attached to this bill and made a part hereof. *The roads, so shown, can be changed, altered, added to, or discontinued by the State Highway Commission: Provided,* no road shall be changed, altered or discontinued so as to disconnect county-seats, etc." Hence, the "roads, so shown, can be changed, discontinued, etc." Shown where? Obviously upon the legislative map. In the *Carlyle case, supra,* referring to the legislative map, the Court said: "Of course, changes, alterations and discontinuances of proposed roads shown on the legislative map were authorized under certain limitations, but when that map was actually fitted to the ground by the defendant through the map made by it and posted at the courthouse door, and by the exercise of its discretion in accepting, selecting, and incorporating such road into the State System the explicit legislative declaration was: 'And the decision of the State Highway Commission shall be final.'" In the former *Newton case* the defendant admitted that the existing highway was shown on the legislative map. In this case it

denies that the existing highway is shown on the legislative map, and asserts that the road shown thereon passes through Catawba and Claremont. Assuming that the admission in the former case was erroneously and inadvertently made, and that the present contention is correct, then it follows that the legislative map has in nowise restricted or interfered with the full and free play of defendant's discretion, for the plain reason that it discarded the legislative map entirely and surveyed, mapped and selected the existing highway as the connecting link of the State System between Statesville and Newton. In the former *Newton case* the Court said: "We hold, therefore, that the spirit of the Road Act contemplated all county-seats in North Carolina should be served by the Highway System substantially as designated on the map, etc." The defendant in its brief says: "Now, to what map does the Court refer?" In view of the contention made in this case the words "substantially as designated on the map" are perhaps confusing. But in the former case the plaintiff alleged that the existing road was shown on the legislative map, and was a part of the 5,500 miles of State Highway System as provided for in the act of 1921. The defendant, answering this allegation, admitted that it took over the "existing county road between Statesville and Newton, as described in the complaint." Now, in the complaint the road "was described" as being shown on the legislative map. It was further alleged and admitted and still admitted in this case that the defendant had mapped this same road as required by the law. It was therefore apparent that in the former case both the legislative map and the map made by the defendant were absolutely identical. Hence, the Court used the words "designated on the map" in a general sense. It never occurred to the writer, by reason of the solemn admission in the answer, that there was, in the particular case, any dispute or controversy as to their absolute identity until the point was made for the first time in the petition to rehear the case.

The law permitted the defendant, in the exercise of its discretion, to propose, designate, survey, map and select such existing highway or highways in each county as it intended to establish as links in the system. The map made by it and posted at the courthouse door was the objective notice to all the world of that purpose and intention to incorporate such road into the Highway System. If no objections were made in sixty days, the statute declared in express terms that the discretion of the defendant in the selection or location of links in the State System once exercised, became final.

Again, if it be conceded that the changes, alterations and discontinuances mentioned in section 7 refer only to the legislative map, then the defendant contends that power to totally abandon the existing road in controversy is contained in section 10, subsection (b). The language of

the pertinent clause is "to change or relocate any existing road that the State Highway Commission may now own or may acquire." In the first place, it may be contended with clear support of reason that desirable changes and relocations of an existing highway were made when the defendant surveyed and mapped the highway in 1921, and that one of the main purposes for requiring it to make and post a map of the "routes that are to be selected and made a part of the State System of Highways" was to show any changes or relocations, if the link finally accepted and adopted by it was, as in this case, an existing highway. In the second place, "change or relocation" of an existing highway does not mean that the existing highway may be totally abandoned from end to end, and a new, independent and wholly unrelated project constructed in its stead, because this would result in the substitution of an entirely independent and fundamentally different improvement. For instance, if Fayetteville Street in Raleigh was an existing highway under the control of the defendant, and it was authorized "to change or relocate" Fayetteville Street, would that mean that in exercising the power the defendant could refuse to touch Fayetteville Street at all, or even come near to it, but, upon the other hand, build a new road in Cary or Garner or Morrisville? In our opinion, both reason and the law is to the contrary.

The defendant, in paragraph 3 of the answer, says: "In this connection, it is averred that the route adopted by this defendant is located substantially along the line of the old Lewis Ferry Road, which was the principal road from Statesville to Newton for many years prior to the adoption of the new road, or the lower route, etc." If the defendant, in the exercise of its discretion, had mapped this Lewis Ferry Road and selected it and incorporated it as a link in the system connecting Statesville and Newton, then certainly it could build the proposed road along that line, and the town of Newton would have no standing in court so far as the proposed location of the road is concerned.

Another contention made by the defendant is that if it be not allowed to make new selections and locations for permanent construction, that the result will be that this Court is locating or selecting roads. The selection or location of roads constituting links in the Highway System is the sole and exclusive function of the defendant. This Court has no such power or authority, and has never undertaken to exercise such authority. It has, however, undertaken and now undertakes to say whether or not the defendant has the right, under the law as written, to entirely abandon a highway which, in the free exercise of its discretion, it has surveyed, mapped, accepted and adopted, in conformity with the provisions of the statute. It would be as reasonable to contend that the Court is engaging in contracting or attempting to build a house

because, in cases involving the performance of a building contract, upon admitted facts, it should determine whether or not a contractor had substantially performed his agreement.

In concluding this phase of the case, the Road Act imposed upon the defendant three important duties:

1. To select or locate the various roads in each county which should constitute the permanent connecting links in the State Highway System of "approximately 5,500 miles of hard-surfaced and other dependable highways."

2. To maintain and control the existing highways so selected and adopted "in the most approved manner as outlined in this act," and further "to relieve the counties and cities and towns of the State of this burden."

3. To do such work upon the various links in the system "as will lead to ultimate hard-surfaced construction as rapidly as money, labor, and materials will permit."

In the exercise of its discretion, the defendant has selected the existing road between Statesville and Newton as a permanent link in the State System, and has also maintained this link, so far as this record discloses, in the manner contemplated by law.

When the defendant enters upon the permanent construction of the road a different engineering problem arises. The law clearly realizes that engineering skill requires latitude of discretion and it grants and confers ample latitude. It permits the defendant, in constructing an existing highway or such other routes as it may have selected according to the statute, to make changes and relocations, to eliminate curves, to shorten the alignment of the road, to alter grades and to utilize to the best advantage the topography of the ground where the road is located. In short, in the performance of the duty of the construction of a particular road the law permits free and untrammeled discretion, except it forbids that the particular road should be totally abandoned and a new project substituted therefor, as the judge finds, from one to eight miles distant from the highway which the defendant has established as a link in the system.

We hold, therefore, upon the record as presented:

1. That the defendant, in the free exercise of its discretion, selected the existing road between Statesville and Newton as a permanent link of the State Highway System.

2. That in the construction of said road the statute authorizes the defendant to make such changes and relocations of said existing highway as it may deem necessary for the efficient and economic construction thereof.

3. That the road proposed by the defendant, indicated on the map as the orange line, or Line No. 3, is a radical departure from the highway already selected and incorporated by the defendant as a permanent link in the State System, and that such proposed road is not a change or relocation of the highway selected, but is a totally new and independent project, and does not comply with the meaning and intent of the law as written.

The second phase of the case involves Catawba and Claremont. Both of these towns filed petitions in the cause to be made parties. After the reading of the pleadings, the trial judge concluded that these towns were not proper parties to the suit, and ordered that the answers filed by them be stricken from the record. From this order both towns appealed. While there is no finding of fact in the record to that effect, assuming, however, that these two towns are principal towns in Catawba County within the meaning of the law, what are the rights of these towns with respect to the selection and construction of the road in controversy? In 1921, when the defendant selected the permanent link of the State Highway System in Catawba County and mapped the same and posted the map at the courthouse door in Catawba County, the law required the defendant to notify "the street-governing body of each city or town in the State . . . of the routes that are to be selected and made a part of the State System of Highways." There is no finding of fact in the record about this matter, but the law presumes that when the defendant was charged with a public duty that it has properly performed that duty. No protest was made by Catawba or Claremont, and no objection filed to the selection of the road within the time allowed by statute. The map made by the defendant and posted at the courthouse door showed that the defendant was proposing an existing highway as a permanent link in the system, and that neither Catawba nor Claremont was shown on said highway. Again, when the defendant proposed the road which was the subject of the former *Newton case,* the road so proposed touched neither Catawba nor Claremont. There was still no protest or objection by either of these municipalities. The first protest or intimation of interest in this controversy was manifested when said towns filed petitions in this cause on 1 December, 1926. Unquestionably, these flourishing municipalities were originally as much the beneficiaries of the road law as Newton, but the law did not compel them to assert their rights if they were satisfied with the action of the defendant in selecting the present road as the connecting link of the Highway System in Catawba County. We therefore affirm the ruling of the trial judge in denying the petitions of Catawba and Claremont.

However, the defendant has the power, under the law, if, in its discretion the exercise thereof shall seem wise and proper under section 10,

subsection (b), "to locate and acquire rights of way for *any new roads* that may be necessary for a State Highway System, with full power to widen, relocate, change or alter the grade or location thereof." The Legislature, in its wisdom, by this section of the law, empowered the defendant to select and construct new roads which it deemed necessary for the State System in such way and manner and in such places as it might determine.

The ruling of the trial judge in denying the writ of mandamus is affirmed upon the facts contained in the present record. The ruling of the trial judge in dissolving the injunction issued by Judge McElroy on 22 November, 1926, is reversed, and the defendant, its agents and servants, are restrained and enjoined from abandoning the existing road in Catawba County as a permanent link in the State System of Highways, to the end that work done thereon "shall be of such a character as will lead to ultimate hard-surfaced construction as rapidly as money, labor and materials will permit."

Reversed.

STACY, C. J., and ADAMS, J., concurring in part and dissenting in part: We agree with the majority that the application for writ of mandamus was properly denied. We dissent from the order enjoining the defendant "from abandoning the existing road in Catawba County as a permanent link in the State System of Highways."

MRS. RUTH PETERS ET AL. v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY ET AL.

(Filed 25 June, 1927.)

1. Master and Servant—Employer and Employee—Negligence—Evidence—Nonsuit.

Evidence tending only to show that the plaintiff was an employee of defendant corporation in charge of a store in defendant's chain thereof in a city, and that defendant's assistant superintendent at that place, as a matter of accommodation, invited the plaintiff employee and his wife to ride to their home with him in an automobile furnished him by the defendant corporation for the performance of his duties: *Held*, the defendant is not liable in damages for the negligent driving by its superintendent which caused the damages alleged to have been received by the plaintiff and his wife, the subject of the action.

2. Negligence—Municipal Corporations—Ordinances—License—Permit to Drive—Evidence—Instructions—Proximate Cause.

One driving an automobile in a city in violation of its ordinance requiring a driver's license is not liable in damages to one riding with him for his negligence in not avoiding a collision, unless the failure to have the license is the proximate cause of the resultant injury, and where there is no evidence thereof, an instruction of the court involving this phase of liability is error.

APPEAL by defendants, the Great A. & P. Tea Company and Chas. H. Baucom, from *Lyon, J.*, at October Special Term, 1926, of MECKLENBURG. Reversed in appeal of the Great A. & P. Tea Company; new trial in appeal of Chas. H. Baucom.

Two actions to recover damages for personal injuries resulting from a collision between two automobiles at the intersection of two streets in the city of Charlotte—one by Mrs. Ruth Peters and the other by W. T. Peters—instituted against defendants, the Great A. & P. Tea Company, Chas. H. Baucom and Hugh Puckett, both arising out of the same transaction, and involving the same allegations, were by consent of all parties thereto consolidated for trial and judgment. Defendant, Hugh Puckett, denied the allegations of the complaints upon which plaintiffs seek to recover judgment against him, and set up a cross-action against his codefendants in which he demands judgment against them for damages resulting from injury to his automobile.

Issues submitted to the jury were answered in accordance with the contentions of plaintiffs and of defendant Hugh Puckett. Judgments were rendered upon the verdict (1) that plaintiff, Mrs. Ruth Peters, recover of defendants, the Great A. & P. Tea Company and Chas. H. Baucom the sum of $35,000; (2) that plaintiff, W. T. Peters, recover of said defendants the sum of $5,000; and (3) that defendant, Hugh Puckett, recover of his codefendants the sum of $167.64.

From these judgments defendants, the Great A. & P. Tea Company and Chas. H. Baucom, appealed to the Supreme Court.

J. L. Delaney and Stancill & Davis for plaintiffs.

T. L. Kirkpatrick, Taliaferro & Clarkson and Thomas C. Guthrie for defendants.

CONNOR, J. Upon its appeal to this Court defendant, the Great A. & P. Tea Company, relies chiefly upon its assignment of error based upon its exception to the refusal of the court to allow its motion for judgment as of nonsuit at the close of all the evidence. C. S., 567. The liability of this defendant for damages sustained by both plaintiffs and defendant, Hugh Puckett, must be determined in the first instance by

whether or not there was evidence sufficient to be submitted to the jury tending to show that at the time of the collision Chas. H. Baucom, assistant superintendent of said defendant, was acting within the scope of his employment in driving the automobile in which plaintiffs were riding and with which defendant Puckett's automobile collided. This defendant is not liable for said damages, although caused by the negligence of its employee, Chas. H. Baucom, while driving its automobile, unless said employee was at the time of such negligence acting within the scope of his employment. As said by *Brogden, J.,* in his opinion written for this Court in *Grier v. Grier,* 192 N. C., 760, the general principles of law governing such cases as this are well established. The chief difficulty encountered is in applying these general principles to the facts of particular cases.

The allegations of the complaints herein, and also of the answer of defendant, Hugh Puckett, setting up his cross-action against his co-defendant, are as follows:

"4. That the defendant, Chas. H. Baucom, is a citizen of the State of North Carolina, residing in the city of Charlotte, and was at the time and place hereinafter mentioned assistant district superintendent of the defendant, the Great Atlantic & Pacific Tea Company, and as such had in his charge and was operating a certain Ford automobile owned and furnished him by the defendant, the Great Atlantic and Pacific Tea Company, to use in connection with his duties as assistant district superintendent, and at the time hereinafter mentioned was operating said automobile with full knowledge, consent and approval of the defendant Tea Company."

Answering these allegations defendants, the Great Atlantic and Pacific Tea Company and Chas. H. Baucom, say:

"The defendant, Chas. H. Baucom, admits so much thereof as alleges that he is a citizen of the city of Charlotte, county and State aforesaid, and was at the time and place hereinafter mentioned assistant district manager of the Great Atlantic and Pacific Tea Company; the said Chas. H. Baucom admits that at the times herein complained of he was operating a Ford automobile belonging to his codefendant, the Great Atlantic and Pacific Tea Company. Each and every other allegation therein contained are untrue and denied, the defendants Chas. H. Baucom and the Great Atlantic and Pacific Tea Company alleging the truth to be as hereafter set out."

These defendants in their further defense to any recovery against them or either of them say:

"1. That the defendant, the Great Atlantic and Pacific Tea Company, operates a chain of stores in the city of Charlotte, county and State aforesaid, and the defendant, Chas. H. Baucom, was employed by the

said defendant, the Great Atlantic and Pacific Tea Company, having charge of one or more of its stores in said city, and that W. T. Peters was an employee of said defendant, the Great Atlantic and Pacific Tea Company, and was employed as a clerk therein at the time herein mentioned, and that Mrs. Ruth Peters, the plaintiff herein named, and the wife of the said W. T. Peters, on the night in question was in defendant's store with her said husband, waiting until the said W. T. Peters had concluded his day's employment, and that about the hour of 11:20 p.m. the defendant, Chas. H. Baucom, went by the store of the Great Atlantic and Pacific Tea Company, where the said W. T. Peters was engaged, and offered out of the generosity of his heart and the goodness of his nature to allow the said W. T. Peters and his wife, Mrs. Ruth Peters, the plaintiff herein named, to ride with him in his said machine as far as their home in the said city of Charlotte.

"2. That the defendant, the Great Atlantic and Pacific Tea Company, had not authorized or directed the said Chas. H. Baucom to extend this courtesy as aforesaid to the said plaintiff and her husband, and that in extending the courtesy herein mentioned, permitting the said plaintiff and her husband to ride in said car, was not in direct line of the duty of the defendant, Chas. H. Baucom, and has not the approval of the defendant, the Great Atlantic and Pacific Tea Company, and at the time the said defendant, Chas. H. Baucom, drove said car the said Chas. H. Baucom was not in the regular line or lines of his duty for the Great Atlantic and Pacific Tea Company, and was not performing or doing the duties for which he was hired or then employed, but that the defendant, the Great Atlantic and Pacific Tea Company, had no knowledge, expressed or implied, of the acts of said Chas. H. Baucom, had not assented thereto, expressly or impliedly, and had not knowledge and did not give its consent for the said Chas. H. Baucom to be conveying the said Mrs. Ruth Peters or her husband in its automobile."

As pertinent to the question involved in the issue thus raised by the pleadings, plaintiffs offered evidence as follows:

W. T. Peters, one of the plaintiffs, testified as follows: "In June, 1925, I was living on Central Avenue, in the city of Charlotte. I worked at that time for the defendant, the Great Atlantic and Pacific Tea Company, at its store located on South Torrence Street. I know the defendant Chas. H. Baucom. At the time of the accident he was assistant supervisor over me for the defendant Tea Company. He checked up the stores to see the amount of business we were doing; talked to us about how to get the business, and came around every day to get the money to take it to the bank. He came around to the store I was in. The defendant Tea Company had between twenty-five and thirty stores in Charlotte at that time. On the night of 27 June, 1925,

which was Saturday night, I was working at the Tea Company's store on South Torrence Street. Mr. Baucom came to this store around ten o'clock, closing time, that night; he came there to show me about the day's work, and some things about the business that had not been shown to me before. After we closed the store we went over the books thoroughly; he showed me about the things I did not know. I was a new man in the store. He came there around ten o'clock and stayed there until 11:20. He was traveling in a Ford roadster, which was the property of the defendant Tea Company. This car was used by the defendant Tea Company for the purpose of checking up on the stores. The Tea Company had owned this particular car for some time. Mr. Rankin was the supervisor before Mr. Baucom. Mr. Rankin used this car before he was transferred to Asheville; it was afterwards used by Mr. Baucom. I am not positive about where the car was kept.

"After I had closed the store we, Mr. Baucom and our wives, started home. I had two bags of groceries—our week's supply—which I was taking home. Mrs. Baucom was with Mr. Baucom, and they asked us to let them take us—my wife and me—home. I said, 'No, we only live a short way, and can walk. We have so many groceries here, and it will take up too much room in the car.' They insisted, and we got in the car, which was a Ford roadster. Mr. Baucom was driving; his wife was next to him, and then my wife, and I was back on the running board, holding on to the top, on the right hand side of the car."

On cross-examination this witness testified further: "I had been at the Torrence Street store about two weeks before the accident; the night of the accident was my second Saturday night there. It was my duty at the end of each week to make up a written report and forward it direct to Richmond, showing all cash receipts and disbursements of the business for the week. I did not report to Mr. Baucom. It was my duty to make the report. No one had shown me about the books, and I asked Mr. Baucom if he would mind going over the books with me. I told him that Saturday morning when he was at the store that I could not make out the report, and that he would have to show me. He came back to the store that night and helped me with the report. We left the store about 11:20. I had locked the door, and my wife was sitting there waiting for me to go along with her. She had come to the store about 7 o'clock p.m., and stayed until closing time. She was not employed by the defendant Tea Company. She helped me about the store. Defendant company did not pay her anything; she was just there, out of the generosity of her heart, helping me. Mr. Baucom insisted upon taking us home. He said that it would not inconvenience him. I do not know where he lived."

Mrs. Ruth Peters, one of the plaintiffs, testified as follows: "On Saturday night, 27 June, 1925, the night of the collision, I was with my husband, W. T. Peters, at the store of defendant Tea Company on Torrence Street. I was helping him. He was in the habit of closing the store on Saturday night at 10 o'clock. On this night he closed at 11:15. The reason he closed later than usual was that Mr. Baucom came out there to help with the books. They went over the books and left the store about fifteen or twenty minutes after 11 o'clock. It was our custom to buy enough groceries Saturday night for the coming week. We got the groceries after Mr. Peters finished with Mr. Baucom. Mr. Peters locked up the store and we went outside. As we started up the street Mr. Baucom asked us to go home with him in his car. He had a small Ford roadster, and his wife was with him. We thought it would be too crowded in the car, and as we were accustomed to walk home through the park, we at first declined. He insisted that we ride with him, so we all got in. Mr. Baucom was driving the car in the direction of our home."

Chas. H. Baucom, one of the defendants, testified as follows: "At the time of the accident I was working for the defendant Tea Company, in the position of assistant superintendent. The manager of the defendant company's store on Torrence Street was W. T. Peters; his duties were to run the store; he was in charge of the store, and was to sell merchandise and make up his reports. He was held responsible for the store, and mailed his reports direct to the head office at Richmond. It was no part of my duty to make his reports. I collected all of his money at different times during the day preceding the night of the accident, and deposited it in bank. At my last collection Mr. Peters asked me to come by and help him with his books; that was not part of my duty. I went there that night, accompanied by my wife. I showed Mr. Peters how to make up his reports. He closed the store about 11 o'clock. Mr. and Mrs. Peters had some bundles. At their request I consented to take them home in my car. They got in the car and I turned around to go toward Cecil Street."

On cross-examination this witness testified as follows: "My position was assistant supervisor. I had been working for defendant company eight or nine years. My duties were to make collections daily, and twice on Saturday deposit the money in bank, see that the stores were kept clean and run correctly. I had supervision of ten stores in Charlotte. I took an inventory of each store once a month. I went to these stores once every day in a Ford automobile furnished by defendant Tea Company. The car was kept at my home, 215 Vail Avenue. I used it in going to and coming from my home to my business and in carrying on my business every day.

"I went to the store on Torrence Street every day for the purpose of inspecting the store and the day's work. I did not go there that night for that purpose. I had finished my work that Saturday at 8.30 p.m. It was not my duty to check up Peters because he was a new man. I did not check up his reports. He was supposed to know how to make them out. I went to the store that night about 10 o'clock because he asked me to do so. I told Mr. and Mrs. Peters that I could take them home; they said they did not have any way to get their groceries home. I said, 'I guess I can take you home.'"

There was a collision between the automobile driven by defendant, Chas. H. Baucom, in which plaintiffs, W. T. Peters and his wife, Mrs. Ruth Peters, were riding, and the automobile driven by defendant, Hugh Puckett, at the intersection of Elizabeth Avenue and Cecil Street, resulting in serious injury to both Mr. and Mrs. Peters and in injury to Puckett's automobile. The jury has found upon conflicting evidence that this collision was caused by the negligence of Chas. H. Baucom.

Upon a careful consideration of the foregoing evidence, which is all the evidence set out in the case on appeal, pertinent to the question as to whether defendant, the Great A. & P. Tea Company is liable to plaintiffs for damages resulting from their injuries, or to Puckett for damages resulting from injury to his automobile, we are of the opinion that there was error in refusing the motion of defendant, the Great A. & P. Tea Company, for judgment as of nonsuit, at the close of all the evidence.

The principles of law, under the decisions of this Court, applicable to the facts which the evidence in this case tends to establish, have been recently stated in the opinion written by *Brogden, J.*, in *Grier v. Grier*, 192 N. C., 760. Upon the authority of that case the assignment of error of defendant, the Great A. & P. Tea Company, based upon its exception to the refusal of its motion for judgment as of nonsuit must be sustained. The decision in *Fleming v. Holleman et al.*, 190 N. C., 449, is not controlling in this case. In that case it was admitted in the answer of the defendants, that the agent and employee of the owner of the car, at the time of the injury was engaged in the operation of the car for and in behalf of his employer, the defendant, Armour & Company, and with its knowledge, consent and approval. There is no evidence in this case tending to show that defendant, Chas. H. Baucom, employee of his codefendant, the Great A. & P. Tea Company, was acting within the scope of his employment by said company, while driving its automobile, at the time of the collision with the automobile driven by defendant, Hugh Puckett.

The judgments as to defendant, the Great A. & P. Tea Company, are reversed. As to this defendant the action of plaintiffs, and the cross-action of defendant, Hugh Puckett, are dismissed.

On 27 June, 1925, the date of the collision, the following ordinance was in force and effect:

"It shall be unlawful for any person to operate a motor vehicle upon the streets of said city without a license or permit from the board of commissioners, said license or permit to be issued subject to regulations herein set out. Upon written application to said board of commissioners, as herein set out and obtaining said license or permit, the holder thereof must carry same with him at all times subject to inspection at all times upon request. This section shall not apply to nonresidents remaining in the city for a period of not more than two weeks."

There was evidence tending to show that defendant, Chas. H. Baucom, had no license or permit to drive a motor vehicle on the streets of the city of Charlotte on the date of the collision, as required by this ordinance.

The court instructed the jury upon the issues involving liability of defendants to Mrs. Ruth Peters, as follows: "Now if you find that Baucom was operating the car without any permit, without any city license, on one of the public streets of the city of Charlotte, that would make him guilty of negligence, but that would not entitle the plaintiff to have you answer that issue 'Yes,' unless you go further and find that at the time of the occurrence he was acting in the scope of his authority for the defendant Tea Company and that such negligence on his part was the proximate cause of the injury complained of, and if you so find, it would be your duty to answer the first issue 'Yes.' "

The first issue was with respect to the negligence of defendant, the Great A. & P. Tea Company, as the cause of the injuries complained of.

The second issue was with respect to the negligence of defendant, Chas. H. Baucom, as the cause of said injuries.

The court further instructed the jury as follows: "Now if you find from the evidence that he was guilty of negligence, not having a permit to operate this car, not having a license on the car, and that he drove his car into the intersection of Cecil Street and Elizabeth Avenue, and that he did not keep a proper lookout, that he was negligent in handling this car; that he did not stop when he saw a car approaching from his right until the car got so close to him that he attempted to swerve, and that he was not acting in such a way as an ordinarily prudent man would have under the circumstances, it would be your duty to answer that issue 'Yes,' if you find such negligence on his part was the proximate cause of her injury, which I have explained."

The court further instructed the jury as follows: "The same charge I have given you as to negligence of the three defendants, the Tea Company, Baucom and Puckett, applies to the issues in the W. T. Peters case."

In the opinion in *Gillis v. Transit Corp.,* 193 N. C., 346, written by *Adams, J.,* it is said: "The breach of a statute is negligence *per se,* but there must be a causal connection between the disregard of the statute and the injury inflicted. *Ledbetter v. English,* 166 N. C., 125." We fail to discover any evidence from which the jury could find any causal connection between the failure of defendant Baucom to have the license or permit required by the ordinance, and the injuries for which judgments against defendant Baucom are demanded. His assignments of error based upon exceptions to these instructions must be sustained. For the error in these instructions, defendant, Chas. H. Baucom, is entitled to a new trial, both in the actions of Mrs. Ruth Peters and W. T. Peters, and in the cross-action of his codefendant, Hugh Puckett. It is so ordered.

In the appeal of defendant, the Great A. & P. Tea Company, the judgment is reversed and the actions of plaintiff and the cross-action of Hugh Puckett are dismissed.

In the appeal of defendant, Chas. H. Baucom, there must be a New trial.

TOWN OF YADKIN COLLEGE v. STATE HIGHWAY COMMISSION.

(Filed 25 June, 1927.)

Highways—Roads and Highways—State Highway Commission—Principal Towns—Consent—Unimportant Changes of Route—Injunction.

The provisions of the State Highway Act, ch. 46, Public Laws of 1927, required the consent of the street-governing body of the town for the State Highway Commission to change a highway connecting county-seats, by the express provisions of the act apply to county-seats and principal towns along the existing route, and not to such towns as do not come within the intent and meaning of the words "important towns," and where, in the exercise of its discretion, the State Highway Commission has not made a radical change, but a slight change to reduce the cost of construction of an existing route, the consent of an unimportant town is unnecessary, and having acted within the powers conferred, the act of the State Highway Commission therein, having previously posted the notices at the proper county-seat, etc., as the statute requires, and without valid objection, may not be enjoined.

CIVIL ACTION heard before *H. Hoyle Sink, Special Judge,* 13 May, 1927.

The plaintiff instituted an action to restrain the defendant from abandoning a portion of highway No. 75 between Lexington, the county-seat of Davidson County, and Mocksville, the county-seat of Davie

County. The road formerly used as the route of travel between said county-seats passed through Yadkin College, a village in Davidson County. The defendant, in order to shorten the alignment of said road, proposed to divert the road some distance east of Yadkin College, re-entering the present highway to Mocksville at Fork Church. The present road is shown on the map filed in the cause and designated as the yellow or northern route. The proposed road is shown in red and is the southern route.

The findings of fact and judgment are as follows:

This cause coming on to be heard before me at chambers at Lexington, N. C., on 13 May, 1927, upon notice to show cause issued by Hon. John M. Oglesby, the judge of the Superior Court presiding over the courts of the Twelfth Judicial District, which notice to show cause was made returnable before the said Hon. John M. Oglesby on Wednesday, 11 May, 1927, later being set before me to be heard at 10:30 a.m., 13 May, 1927, in Lexington, N. C., which latter agreement was signed by the attorneys for the plaintiff and defendant, and approved by Judge John M. Oglesby, presiding over the courts of the Twelfth Judicial District.

The original order was to show cause, if any, why the defendant, State Highway Commission, should not be restrained from abandoning highway, route No. 75 (indicated by yellow line on map filed as Exhibit A) where it passes through the town of Yadkin College, in Davidson County, and why it should not be restrained from building the road and bridge on the proposed new part of said route No. 75 (on the line indicated in red on a map filed as Exhibit A). All the parties in interest being represented by counsel, and after full and careful consideration of the pleadings and affidavits and exhibits offered, as well as the argument of counsel, the court finds as follows:

1. That two routes were surveyed for the location of the road from a point approximately one and one-half miles east of Yadkin College, in Davidson County, to Fork Church, in Davie County. The northern route is indicated on the map, defendant's Exhibit A, by a yellow line; the southern route is indicated on the map, defendant's Exhibit A, by a red line. The yellow line indicates generally the route followed by the old road known as highway No. 75, leading through Yadkin College. The red line indicates the proposed new route from a point one and one-half miles east of Yadkin College to Fork Church in Davie County.

The yellow line indicates generally the route shown on a map found at page 56, ch. 2, of the Public Laws of 1921, entitled, "Map of North Carolina State Highway System." The route indicated by the yellow line was taken over from Davidson and Davie counties subsequent to 1921, and has since that time been maintained as a part of route No.

75 of the State Highway System. Between the two points above named the route indicated by the red line is approximately one mile shorter than the route indicated by the yellow line or the route originally accepted by the State Highway Commission.

2. Yadkin College is not shown on the highway map above referred to.

3. That the route indicated by the yellow line locally referred to as the Fulton's Ferry route crosses two creeks and covers a distance one mile greater than the red or Oakes' Ferry route, making the former or Fulton's Ferry route cost $84,860 more than the red or Oakes' Ferry route, said figures being estimate made by the State Highway Commission after protest had been filed by citizens of Yadkin College and citizens of Davie County when the bridge was first located at the lower route under an act of the 1925 General Assembly, providing that the bridge be built at such location and of such type as the State Highway Commission may approve in connection with State Highway No. 75, connecting the county-seats of Lexington and Mocksville. This act of the 1925 General Assembly provided that the counties of Davidson and Davie might advance the money for the building of the bridge. After hearing complaints filed and after making additional surveys and estimates of comparative cost and finding that the red or Oakes' Ferry route would cross only one creek, save one mile in distance and result in a saving of $84,860, the Highway Commission determined upon the lower route. By reason of the failure of Davie County to appropriate or advance its share of the funds the bridge was not begun until March, 1927. The State Highway Commission, however, and this is admitted, has steadfastly contended that the red or Oakes' Ferry route was the proper location and the one settled upon by it prior to 1927.

4. That the road governing body of Davie County protested the changed location, and was overruled, after due notice, and a formal hearing before a committee of the State Highway Commission, in accordance with chapter 46 of the 1927 Highway Act. The road governing body of Davidson County filed no objections.

5. The section of Highway No. 75, from Lexington to Mocksville is in the heart of industrial North Carolina, and will unquestionably receive exceptionally heavy traffic upon the completion of the river bridge. The natural and direct course for it to follow is the red, or Oakes' Ferry route.

6. Yadkin College was incorporated under the laws of 1874-1875, chapter 78. It has connected with it a history that lends credit not alone to the school that gave it its name, but to the county of which it is a part. The roads and streets of said town, under the laws providing for its incorporation, were placed under a board of commissioners. It does not provide that its mayor shall have authority over its roads or

streets. Ed. L. Green, the plaintiff in this cause, was elected mayor of Yadkin College in the year 1898. It is admitted by the plaintiff that no election was held from that time until 2 May, 1927, at which time the said Ed. L. Green was again elected mayor. This the court finds as a fact.

The court further finds that Yadkin College exercised none of the privileges, prerogatives or authority common to municipalities during a period of approximately twenty-eight years. The court finds as a fact that Yadkin College is an incorporated town by reason of the principle that a municipality cannot forfeit its charter by reason of non-usage. The town of Yadkin College has a population of approximately 100 people with a postoffice and no substantial industries. The commissioners of said town, who are clothed with authority over streets and roads, have made no protest or record against the proposed change in route No. 75, and are not parties to this action, which is the subject of this litigation. The only protest being filed is that of Ed. L. Green, mayor of Yadkin College.

At the hearing attorneys for A. M. Brooks and Thomas J. Byerly moved to be admitted as parties plaintiff, which motion the court overruled, and to which order said parties excepted (accepted) (under section 7 of the State Highway Act of 1927, which provides that only the road governing bodies of counties and municipalities are permitted to maintain actions against the State Highway Commission relative to locations).

7. The court finds as a fact that Yadkin College, although an incorporated town, is not a principal town as contemplated in section 2, chapter 46, of the Public Laws of 1927.

8. That the location of the section of road between Lexington and Mocksville, on route No. 75, had been definitely located on the red or Oakes' Ferry route prior to the enactment of chapter 46 of the Public Laws of 1927, and therefore the red or Oakes' Ferry route was confirmed by section 6 of said chapter 46 of the Public Laws of 1927.

The court therefore refuses the motion for restraining order and dismisses the action of the plaintiff.

Walser & Walser and Z. I. Walser for plaintiff.
Raper & Raper and Assistant Attorney-General Ross for defendant.

BROGDEN, J. From the findings of fact and the evidence in the cause, it appears that there was an existing road between Lexington, the county-seat of Davidson County, and Mocksville, the county-seat of Davie County. This road passed through the village of Yadkin College. The defendant proposed to shorten the alignment of said road by construct-

ing the road along a new location, which leaves the present road some distance east of Yadkin College and reënters the present road at Fork Church. In effect the proposed change or shortening of the line eliminates a loop in the present road, and also eliminates certain alleged expensive creek crossings. The plaintiff contends that the defendant has no power to make this change in the line of the road.

Yadkin College is not shown on the legislative map attached to the Act of 1921. There is no allegation, evidence, or finding of fact, that the defendant mapped this particular road and posted it at the courthouse door in Davidson County. It is further found as a fact, and this finding is supported by the evidence, that Yadkin College is not a principal town as contemplated by the statute. It also appears that the extent of the contemplated change is a mere shortening of the alignment of the highway, and that the departure between the proposed line and the present highway varies from nothing to perhaps seven or eight thousand feet. Under the particular facts and circumstances disclosed in the record this would not be such a radical departure as condemned in the *Newton* and *Carlyle cases*. Indeed, the principle announced by *Connor, J.*, in *Johnson v. Highway Commission*, 192 N. C., 561, is decisive of this case upon the facts disclosed in the record, if the proposed change in the road was made under the Act of 1921.

It appears from the record that the defendant posted a map at the courthouse door in Davidson County and in Davie County, showing the proposed changes in accordance with the provisions of chapter 46 of the Public Laws of 1927. All changes authorized by chapter 46 of the Public Laws of 1927 were subject to the provisions of sections 3 and 4 of said act. Section 3 of the act provides that the number of highways entering the corporate limits of a county-seat or principal town "now served by the State Highway Commission shall not be reduced without the consent of the street governing body of said town." The Court held in *Carlyle v. Highway Commission*, 193 N. C., p. 36, that the defendant was without power to reduce the service of the system to a county-seat "by destroying and consolidating a separate and independent link or connection by which that service is to be delivered to the county-seat." However, it appears in this case that the plaintiff is not a principal town as contemplated by the statute, and hence the defendant was under no obligation to procure the consent of the street governing body thereof.

Again, plaintiff contends that it is "immediately effected," as defined by section 2 of said chapter 46, by the change in the route of the road proposed by the defendant. The pertinent clause of section 2 is as follows: "Any county-seat or principal town shall be deemed 'immediately effected' if the proposed change or alteration shall enter or leave said town by streets other than those used for such purposes prior to the

proposed change." But it will be observed that the application of the principle assumes the existence of a principal town or county-seat, and Yadkin College is neither.

We hold, therefore, that the plaintiff is not entitled to the relief requested, and the judgment rendered by the trial judge is

Affirmed.

TOWN OF DILLSBORO v. ALICE M. DILLS, WIDOW OF W. A. DILLS, BEULAH WEAVER AND HUSBAND, A. H. WEAVER, GERTRUDE McKEE AND HUSBAND, E. L. McKEE, MINNIE GRAY AND HUSBAND, B. E. GRAY, HEIRS AT LAW OF W. A. DILLS, DECEASED.

(Filed 25 June, 1927.)

Municipal Corporations—Cities and Towns—Evidence—Admissions—Res Gestae.

Admissions of members of a governing body of a town must be *pars res gestæ* in order to be properly received in evidence, and when they relate to matters that have occurred in the past they are inadmissible.

APPEAL from *Harwood, J.*, and a jury, at October Term, 1926, of JACKSON. New trial.

This is an action brought by plaintiff against the widow and heirs at law of W. A. Dills to restrain them from trespassing on certain land (describing it) in the town of Dillsboro (hauling rock and other material and placing same on the land for the purpose of erecting a building, etc.). Plaintiff claims that the land in controversy was dedicated to it by W. A. Dills, the husband of Alice M. Dills, defendant, and father of the other defendants. The plaintiff has been in open, actual, continuous, notorious and adverse and peaceable possession since 1885, some forty-one years. That W. A. Dills in his lifetime dedicated the land to plaintiff and plaintiff has been in adverse possession. The defendants denied the allegations made by plaintiff, and contended that the town of Dillsboro was not incorporated until 1889.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Did W. A. Dills dedicate to the town of Dillsboro the lot of land described in the complaint? Answer: No.

"2. Has the plaintiff, the town of Dillsboro, been in open, notorious, continuous and adverse possession for twenty years of the lot of land described in the complaint? Answer: No.

"3. Are the defendants in the unlawful, wrongful possession of the lot of land described in the complaint? No answer.

"4. What damages, if any, is the plaintiff entitled to recover? No answer."

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

Sutton & Stillwell, T. D. Bryson and J. J. Hooker for plaintiff.
W. R. Sherrill and Alley & Alley for defendants.

PER CURIAM. The plaintiff excepted and assigned error as to conversations had by Mrs. Alice M. Dills with certain members of plaintiff's board of aldermen. The nature of the evidence indicates admissions on the part of the aldermen that the plaintiff did not claim title to the property in dispute. Exception and assignment of error was also made to the testimony of John Leatherwood, a member of the board of aldermen, who corroborated Mrs. Dills.

From a thorough examination of the record it does not appear that these aldermen had authority to make the admissions.

The principle of law governing such matters is stated in Dillon on Municipal Corporations, Vol. I (5 ed.), sec. 435, as follows "The acts of the officers of municipal corporations in the line of their official duty, and within the scope of their authority, are binding upon the body they represent; and *declarations and admissions accompanying such acts as part of the res gestæ,* calculated to explain and unfold their character, and not narrative of past transactions, are competent evidence against the corporation. But if the declarations of the officers are not made as a part of the *res gestæ,* or at a time when they are engaged in the performance of their duties, they are not admissible in evidence against the municipality. If the statements or admissions relate merely to past transactions, they fall within the rule that they are not a part of the *res gestæ,* and are inadmissible."

For the reasons given there must be a

New trial.

O. HENRY MOORE v. G. L. TIDWELL ET AL.

(Filed 25 June, 1927.)

Appeal and Error—Motion to Retain Cause in Superior Court to Correct Amount of Judgment.

Where the Supreme Court, on appeal, has allowed a motion for a new trial for newly discovered evidence after having fixed a time in which the parties may file their affidavit in support of the motion and *per contra,* the Court will not thereafter allow a motion retaining the case on its docket for the purpose of correcting the amount of the judgment. *Teeter v. Express Co.,* 172 N. C., 620, cited and approved.

MOTION by plaintiff that the judgment of this Court, entered 10 June, 1927, awarding a new trial for newly discovered evidence, be recalled before it is certified to the Superior Court of Mecklenburg County, and that the judgment of $15,000, rendered in this cause against L. B. Cress and J. F. Lowder, from which they appealed, be credited with $3,500, the amount paid plaintiff by L. F. Barnard and the Royal Blue Transportation Company, together with interest thereon from date of payment, 11 August, 1926, the plaintiff now agreeing to remit said amount.

Carswell & Ervin and John M. Robinson for plaintiff.
Hartsell & Hartsell and Preston & Ross for defendant.

PER CURIAM. Prior to the call of this case for argument, which comes from the Fourteenth District, the appealing defendants duly notified plaintiff of their intention to renew the motion, originally made in the Superior Court, for a new trial on the ground of newly discovered evidence. With respect to this motion, the following order was entered 28 April, 1927, and notice thereof duly given to counsel on both sides:

"Motion continued until 24 May, 1927, with leave to both parties to file additional affidavits, if so advised. Appellants shall file their affidavits by 18 May, 1927, and appellees shall have until 24 May, 1927, to file counter affidavits, if so advised."

This order could have but one meaning, *i. e.,* that the Court would hear the motion and determine it on the showing made by the time set.

After carefully considering the affidavits filed on behalf of the defendants in support of their motion and the counter brief filed by plaintiff, the Court was constrained to allow said motion, it appearing that the showing made by appellants was sufficient to meet the requirements laid down in *Johnson v. R. R.,* 163 N. C., p. 453, for the granting of new trials on the ground of newly discovered evidence.

Without expressing any opinion as to the nature of the instrument executed by the plaintiff to L. F. Barnard and the Royal Blue Transportation Company (as it is not properly before us for consideration), it would seem, from the facts now appearing, that the Court made no mistake in ordering a new trial of the cause.

The motion of plaintiff comes too late. It must be denied on authority of *Teeter v. Express Co.,* 172 N. C., 620.

Motion denied.

GUY C. WATERS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 25 June, 1927.)

1. Telegraphs—Negligence—Damages—Courts — Jurisdiction — Federal Courts.

The decisions of the United States Supreme Court control in an action brought in the State court to recover damages for the delay in delivery and error in the transmission of money sent by telegraph from a point in North Carolina to one in another state, and as to whether stipulations appearing upon the message are void as against public policy.

2. Same—Measure of Damages—Mental Anguish.

Under the Federal decisions a recovery of damages for mental anguish, unaccompanied by pecuniary loss or physical pain, or the loss of property or impairment of health or reputation, is not allowed.

3. Same—Torts—Proximate Cause—Speculative Damages.

In order to recover damages of a telegraph company for its negligent failure to correctly transmit or deliver an interstate transmission of money, such damage must be the proximate cause of the negligence complained of, resulting from the negligent act complained of in a continued and unbroken sequence as a reasonably anticipated consequence of the tort, and not such as are purely speculative or remote.

4. Same—Notice to Company—Transmission of Money by Telegraph.

The fact that money is transmitted by telegraph is sufficient notice to the company of the importance of its prompt delivery to the sendee, and where the defendant's agent at the originating point was aware that it is for the use of a member of the sender's family at the delivery point, it is sufficient to put it upon notice that its failure to act with the promptness reasonable for a service in such instances would likely result in damages as the proximate cause.

5. Same.

Held, under the facts of this case, a recovery cannot be had of a telegraph company for injury to health arising from the sickness of the sendee, of which the defendant had no knowledge, express or implied, in failing to get the amount of money the defendant should have delivered in the exercise of reasonable care, but only such as would have been reasonably anticipated as proximately resulting to a sendee in normally good health.

6. Telegraphs—Negligence—Contracts—Stipulations on Message—Unrepeated Messages—Damages.

The stipulation on a telegram restricting the recovery in the event the message is unrepeated, is valid under the United States statutes and decisions of the United States Supreme Court.

7. Same—"Sixty Days"—Stipulation as to Bringing Action.

The stipulation on a telegraphic message avoiding liability to the company for damages for its negligent transmission or delivery, if action is not brought thereon within sixty days, etc., is a reasonable and valid one.

WATERS *v.* TELEGRAPH CO.

APPEAL by defendant from *Stack, J.*, and a jury, at December Term, 1926, of CARTERET. New trial.

This was an action for actionable negligence brought by plaintiff against the defendant for damages. The facts in substance: R. G. Dudley, who lived near Beaufort, N. C., left his daughter, Effie Waters, wife of plaintiff in a dying condition in a hospital in Petersburg, Va. He left with his dying daughter her mother, Dudley's wife, and their two daughters and plaintiff, her husband. In the contemplation of her death, at Beaufort, N. C., he gave defendant's manager, one E. D. Doyle, $325 to wire plaintiff, and the charge $2.19. This was about ten o'clock on the morning of 14 January, 1926. He had no remembrance as to whether he told Doyle what the money was for. On the 15th, at 4:22 p.m., a wire arrived; it was delivered about the middle of next day to him from plaintiff to send $130. He sent $140. His daughter, plaintiff's wife, died on the morning of 15 January. He and his son-in-law, Ed. Campen, on the morning of 16 January, went to meet the corpse and members of the family on the 11:25 morning train, but the body did not arrive, and they went to the telegraph office and found the telegram asking for $130, and about 1 o'clock he wired $140 to plaintiff. Dudley lived about six and a half miles from Beaufort, beyond the limits where defendant delivers messages except by mail. The mail reaches Dudley's home about quarter to ten in the morning. He got the message an hour and a half after it would have reached him by mail. The body reached home—Beaufort—the morning of the 17th. On the 21st the $300 was paid plaintiff's agent. A boy nineteen years of age working at Petersburg for defendant company admitted he had misread the message, and only paid plaintiff $25.

The plaintiff, Waters, testified in part: "I asked him (R. G. Dudley) about the money, and he said yes, he was coming home and would try to send it. I told him I wanted $350, and when he sent it he sent $325. I told him I expected her to die any minute, and I wanted it to take care of her and ship her home. I don't know the day he left, but it was the night of the 14th that I got the telegram, and I went down to the Western Union office and they delivered me the $25. I asked them if that was all, and they said yes. I told them I was expecting some more, but didn't tell them how much. She died the next morning, the 15th. Q. Tell what you did then? A. I didn't know what to do, and I went to the undertaker, and asked him if he would take care of her, and he said 'Nothing doing.' A. After I got $25 I went to the undertaker and asked him would he take care of her." In answer to question by court, the witness said, "I could not get my wife's body without the money." . . . "I then went to the Richmond Trust Company in Hopewell; I got $135 there on my note. I could not borrow any more. I wired my father-in-

law for money, too. I had notified him of my wife's death and he sent me $140. With the $275, in addition to the original $25, I brought her home on the 17th; I don't know exactly, we being delayed two days by the mistake in the telegram. Q. Now, who was up there with you to look after her? A. Her mother and two sisters. Mrs. Clara Dudley, Miss Blanche Dudley, and Mrs. Madera Campen. It cost about $50 caring for them and for myself during the delay for hotel bills and taxi fare." By the court: "Did you pay that? A. Yes, sir. Q. Now what was your physical condition at the time of this? A. I had had a vaccination for smallpox and my arm was in a serious condition. I was having a chill every night and had to carry my arm in a sling. Q. What effect did that trouble you had have on your arm? A. I couldn't get out, for it was raining. It was raining and snowing. Q. How much physical suffering did you have with your arm as a result of this? A. After I came down here and went back it was a week that I couldn't work at all. Q. I am talking about while you were there as a result of it, what effect did it have on you? A. I was having chills during those three days and was in a fever from the vaccination; my arm was swollen and I had to split my sleeve around it. If I could have got the money I could have come on at once and wouldn't have had to go around from place to place to get a note from the bank to get money to bring her down. While I was out trying to get money, my mother in-law stayed with the remains of my wife. She was in the undertaker's shop after she died. I had to go from hotel to hotel, which was about a mile and a half, and it was snowing and bad weather, to get an endorsement on the note. I was sick with my arm and in a fever, and this exposure trying to get the money caused me to have three chills. I never had a chill when my wife died. Q. What effect on your mental condition did those chills have while you were waiting? A. Well, it put me in a bad physical condition and made me sick. Q. Did you have a passenger train leaving Petersburg between eight and nine o'clock in the morning, arriving at eight o'clock that evening? A. Yes, sir; leaving in the morning at 6:35." Most of the evidence was excepted to by defendant, and assignments of error duly made.

The usual "Western Union money transfer" was introduced by defendant in evidence.

"Western Union Telegraph Company:

"Subject to the conditions below and on back hereof, which are hereby agreed to,

"Pay to Guy C. Waters,

"Street and No. Care Petersburg Hospital, Petersburg, Va.

"(Amount) Three hundred and twenty-five dollars and.....cents ($325.00).

"And deliver the following message to payee at the time of payment. All can send. . . . (Signed) R. T. (G.) Dudley."

"All messages taken by this company included in a money transfer are subject to the following terms:

"To guard against mistakes or delays, the sender of a telegram should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any message received for transmission at the unrepeated message rate beyond the sum of five hundred dollars; nor for mistakes or delays in the transmission or delivery or nondelivery of any message received for transmission at the repeated message rate beyond the sum of five thousand dollars, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

"6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission."

Defendant's witness, E. D. Doyle, manager of defendant company, at Beaufort, N. C., on cross-examination by plaintiff, was asked:

"Q. Look at this message from Cora Dudley to Robert Dudley from Petersburg, Va., filed 10 January, 1926. That passed through your office, didn't it?"

9GK 20 Petersburg, Va. 236P. Jan. 10, 1926.
Robert Dudley,
Route 1, Beaufort, NCAR.
Effie is worse come at once all that can dont think she will live thru another night at Petersburg Hospital. Cora Dudley. 510P.

(Witness E. D. Doyle continued): "The message from Guy C. Waters to R. T. Dudley, Petersburg, Va., 14 January, 1926, was delivered through my office at Beaufort."

16GK. DX. 17. Petersburg, Va. 1042A. Jan. 14, 1926.
Robert T. Dudley,
Dely Genl RF 1, Beaufort, NCar.
Mr. Dudley effie is no better she is passing away just as fast as time can move. Guy C. Waters. 1058A.

(Witness E. D. Doyle continued): "The message, Guy C. Waters, Petersburg, to Robert J. Dudley, Beaufort, filed Petersburg, Va., 9:35 a.m., 15 January, 1926, was also delivered through my office. The message from G. C. Waters, filed at Hopewell, Va., 15 January, 1926, to Robert Dudley, Beaufort, was also delivered to my office."

11 GK DX 21 2 Extra Petersburg, Va. 935A. Jan. 15, 1926.
Robert J. Dudley,
Dely Gnteed Route No. 1, Beaufort, N. C.
Effie has passed out she and all the rest of us will be at Beaufort 11 o'clock tomorrow. Guy C. Waters. 1003A.

(Witness E. D. Doyle continued): "I am manager of the office at Beaufort, and was at that time."

29 GK DX 16 1 Extra Hopewell, Va. 513P. Jan. 16, 1926.
Robert Dudley,
Deliver Route 1, Beaufort, NCar.
We all will be there tomorrow AM eleven o'clock be sure have some one meet us. G. C. Waters. P607P.

(The witness E. D. Doyle continued): "At the time when Mr. Dudley filed his application and paid $325 to be transmitted, plus $2.19 transfer charges, I knew a member of his family was sick, at Petersburg. I knew there was some misunderstanding about the $325 transmitted when Mr. Waters sent his message for an additional $130, and I knew Waters' wife had died. On 14 January, we had a wire from Mr. Waters, saying he had to have $130. Mr. Dudley and his son in-law, Mr. Campen, came and said it was strange they having sent $325 that they needed more money, and I told them it had probably been delivered O.K.; that if it had not been I should have heard from the other office by that time; and when the matter was discussed with Mr. Campen, it was decided that possibly Mr. Waters had found his expenses for hospital and undertaker's bills had been greater than he anticipated, though possibly there was a slight question as to whether the money had been delivered. I offered to get a report on it, and as near as I remember, Mr. Campen was the one who declined to get a report and sent the $140 instead of the $130 asked for."

All of the telegrams were plaintiff's exhibits and duly objected to by defendant, and assignments of error made.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant carelessly and negligently fail to transmit and deliver over to the plaintiff the $325, as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damage is plaintiff entitled to recover by reason thereof? Answer: '$400.'"

The defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court.

L. Leslie Davis and Ward & Ward for plaintiff.
Moore & Dunn and Charles W. Tillett for defendant.

CLARKSON, J. The message being interstate, the damages recoverable for negligence is governed by the Federal rule pertaining to interstate messages. *Hardie v. Tel. Co.,* 190 N. C., 45.

In *Southern Express Co. v. Byers,* 240 U. S., at p. 615, the Federal rule is stated as follows: "The action is based upon a claim for mental suffering only—nothing else was set up, and the proof discloses no other injury for which compensation had not been made. In such circumstances as those presented here, the long-recognized common-law rule permitted no recovery; the decisions to this effect 'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation.' Cooley, Torts (3 ed.), page 94." *Western Union Tel. Co. v. Speight,* 254 U. S., p. 17. See Rose Notes on U. S. Reports, vol. 5, p. 605.

In the *Southern Express Co. case, supra,* this State is recognized, among others, as one that allows damages for mental suffering or anguish. In intrastate telegrams, this rule is well settled by precedent in this State, since *Young v. Tel. Co.,* 107 N. C., p. 370, by a unanimous Court in 1890, and has been adhered to ever since, *Smith v. Tel. Co.,* 167 N. C., p. 248, but has no application in the present action, which is governed by the Federal rule. Although there may be negligence to make it actionable, it must be the proximate cause of the injury. "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. . . . The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . It must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee, etc., R. Co. v. Kellogg,* 94 U. S., 469, 24 Law Ed., 256. *Inge v. R. R.,* 192 N. C., p. 522, Supreme Court of U. S. denied petition for *certiorari* 28 February, 1927.

In this State it is held, on the question of proximate cause, see cases cited in *Clinard v. Electric Co.*, 192 N. C., at p. 741: "That it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act."

Damages in the present action cannot be allowed under the Federal rule for mere mental suffering or anguish. Compensation under this rule can be had only for injury to person, property, health or reputation. On the question of proximate cause, evidence of attending circumstances is competent that indicates whether the natural and probable consequences ought to have been foreseen. Defendant's manager admitted: "At the time when Mr. Dudley filed his application and paid $325 to be transmitted, plus $2.19, transfer charges, I knew a member of his family was sick, at Petersburg."

It is a matter of common knowledge that money sent by telegram is out of the ordinary. The telegrams introduced by plaintiff were competent—some evidence to indicate to defendant the plaintiff's need. The record shows that defendant was at least prima facie liable (*Willis v. Tel. Co.*, 188 N. C., p. 114), in not delivering, with reasonable diligence, the money telegraphed, and thus breached its contract. If the breach was the proximate cause of the injury to plaintiff, as alleged, he is entitled to damages for such injury, not for mental suffering or anguish, under the Federal rule, but a reasonable compensation for the wrong done. This would consist of pecuniary loss, of the extra cost and expense to him, the time lost, the physical pain or bodily suffering, the inconvenience, annoyance and fatigue.

1 Southerland, Damages (4 ed.), p. 46, says: "Compensation is the redress which the law affords to all persons whose rights have been invaded; in the nature of things, they must accept that by way of reparation. . . . (p. 47.) The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs. . . . (p. 49.) The law defines it generally by the principle which limits the recovery of damages to those which *naturally* and *proximately* result from the act complained of; or, in other words, to those consequences of which the act complained of is the natural and proximate cause. . . . (p. 50.) These include damages for all such injurious consequences as proceed immediately from the cause which is the basis of the action; not merely the consequences which invariably or necessarily result and are always provable under the general allegation of damages in the declaration, but also other direct effects which have in the particular instance naturally ensued, and must be alleged specially to be recovered for."

The rule in this State is different from the Federal rule, but well stated by *Bleckley, J.,* in *Head v. Railroad,* 79 Ga., 358: "Wounding a man's feelings is as much actual damage as breaking his limb. The difference is that one is internal and the other is external; one mental, the other physical. . . . At common law, compensatory damages include, upon principle and, I think, upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them." *Ammons v. R. R.,* 140 N. C., at p. 200.

26 R. C. L., sec. 104, p. 606, *et seq.,* says: "The courts of a number of the states hold that substantial damages may be recovered for mental anguish proximately caused by the wrongful and negligent failure of a telegraph company to transmit correctly and deliver promptly a telegraphic message, independently of any bodily or physical injury (this is the holding in this State in intrastate messages), but in other jurisdictions, and they are apparently in the majority, the rule is that damages cannot be recovered for mental anguish alone, though some of the courts laying down this rule expressly concede the liability for mental anguish accompanying physical suffering. . . . The rule that mental anguish and suffering, unattended by any injury to the person resulting from simple actionable negligence, is not a sufficient basis for an action for the recovery of damages is supported by the uniform decisions of the Federal courts."

The physical pain or bodily suffering as an element of damages must be based on the probable and natural effect of pain or bodily suffering produced on a normal person and not one sick, unless known to defendant.

The defendant's exceptions *to the evidence* are sustained so far as they conform to the rule as heretofore laid down, as we understand the rule to be, under the U. S. Supreme Court decisions.

The defendant duly excepted and assigned error to the following part of the *charge of the court* below: "The plaintiff has offered evidence tending to show that the damage was the proximate result of the defendant's negligence; that the delay in getting the body here caused anguish, not only suffering of body, but suffering of mind, and the sufferings of the mind, gentlemen, are as real as the sufferings of the body, and are a part of the actual compensation one may recover if sustained by reasonable negligence of the defendant." The assignment of error to the charge made by defendant must be sustained. It is the rule of damages in intrastate messages, but not interstate, upon which the present action is founded.

There is a distinction in sending an ordinary telegram and a money transfer. In the latter case the money is turned over to the telegraph

company by the sender and the money telegraphed by it, under its system, to its agent to be delivered. In the present case the money transfer message signed by Dudley showed the three hundred and twenty-five dollars ($325) in letters and figures. It is recognized by defendant that there will be mistakes and delays in the transmission of unrepeated messages and the liability is limited to $500 under the rules of defendant company. This stipulation has been approved under the act of Congress, 18 June, 1910, 36 St. at Large, 539, by the Interstate Commerce Commission, thus recognizing that liability will occur. "On the back of the telegraph blank was the usual requirement that any claim for damages must be presented to the company in writing within sixty days after filing the message. This regulation has been held reasonable and valid in *Sherrill v. Tel. Co.,* 109 N. C., 527, and has been often approved since." *Bennett v. Tel. Co.,* 168 N. C., 496; *Parks v. Comrs.,* 186 N. C., at p. 500; *Western Union Tel. Co. v. Czizek,* 264 U. S., p. 281. The defendant company has by contract made many stringent regulations, among them requiring notice of the claim within 60 days and limiting its liability—different from the ordinary contracts. *Primrose v. Western Union Tel. Co.,* 154 U. S., p. 1. These provisions have been upheld by the United States Court and Interstate Commerce Commission. With these contract rights given to a public-service corporation that exercise a public employment, when liable, they should be held to a righteous accountability. If the facts in the present action, the probative force being for the jury, do not establish liability and the element of damages set out as we conceive them to be recoverable under the Federal rule, then telegraph companies would take this extraordinary business or field of endeavor with the incident profit and practically carry no burdens. "The distinction between punitive and compensatory damages is a modern refinement." *Pizitz Dry Goods Co. v. Yeldell,* U. S. Supreme Court, Advance Opinions (71 L. Ed.), 2 May, 1927, at p. 556. The distinction is now well settled law in the United States and State courts.

The United States Supreme Court has said: "Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment." *Monongahela Nav. Co. v. U. S.,* 148 U. S., at p. 326, 37 L. Ed., 463. "Damages in a tort action are not divided into actual, compensatory, and exemplary. The term 'compensatory damages' covers all loss recoverable as matter of right. It includes all damages for which the law gives compensation, and that gives rise to the term 'compensatory damages.' 'Compensatory damages' and 'actual damages' are synonymous terms. Pecuniary loss is an actual damage; so is bodily pain and

suffering. *Gatzow v. Buening,* 106 Wis., 1, 49 L. R. A., 475, 80 Am. St. Rep., 1." "Compensatory damages, as indicated by the word employed to characterize them, simply make good or replace the loss caused by the wrong. They proceed from a sense of natural justice, and are designed to repair that of which one has been deprived by the wrong of another. *Reid v. Terwilliger,* 116 N. Y., 530." 2 Words and Phrases, p. 1357.

For the reasons given, there must be a

New trial.